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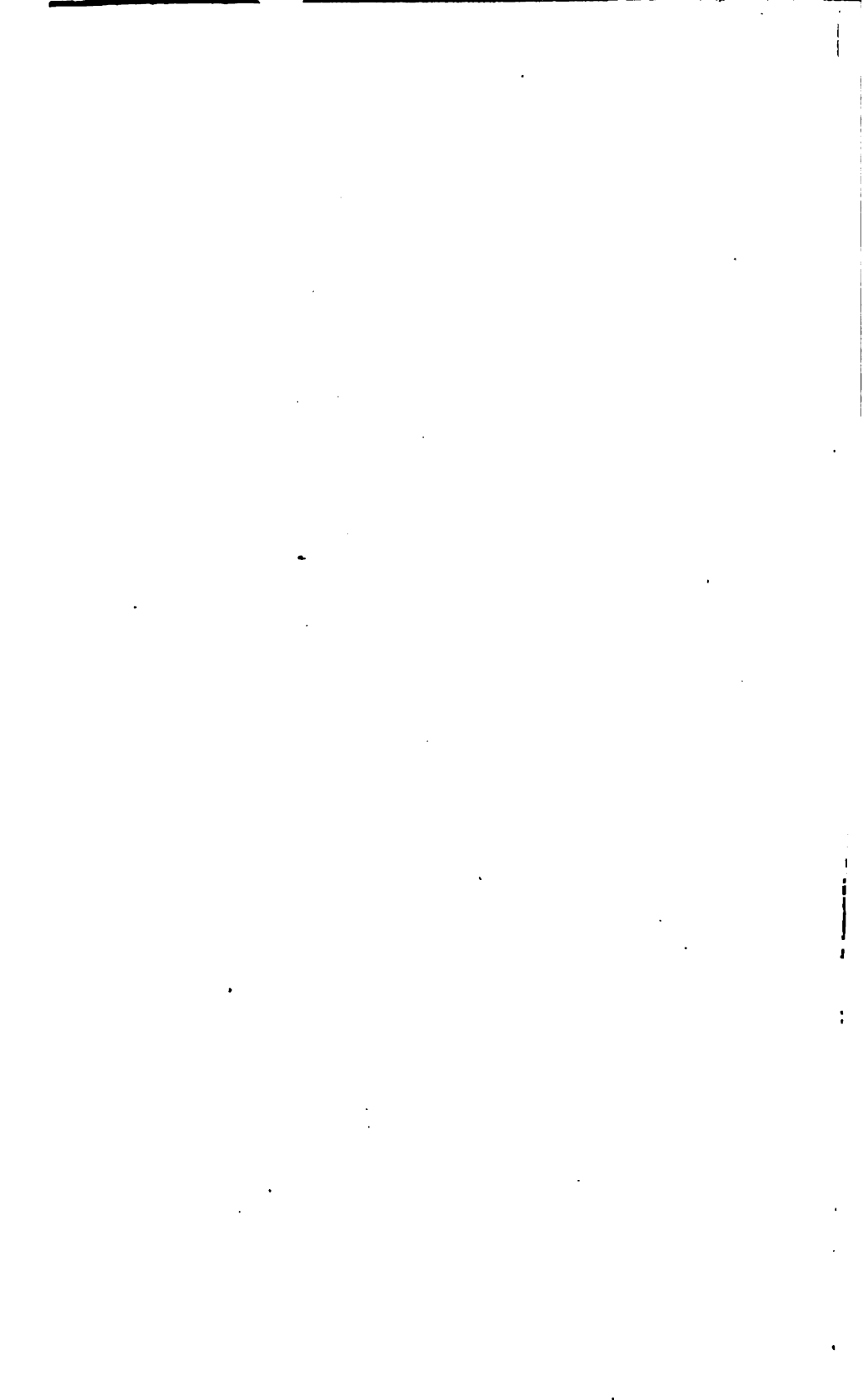
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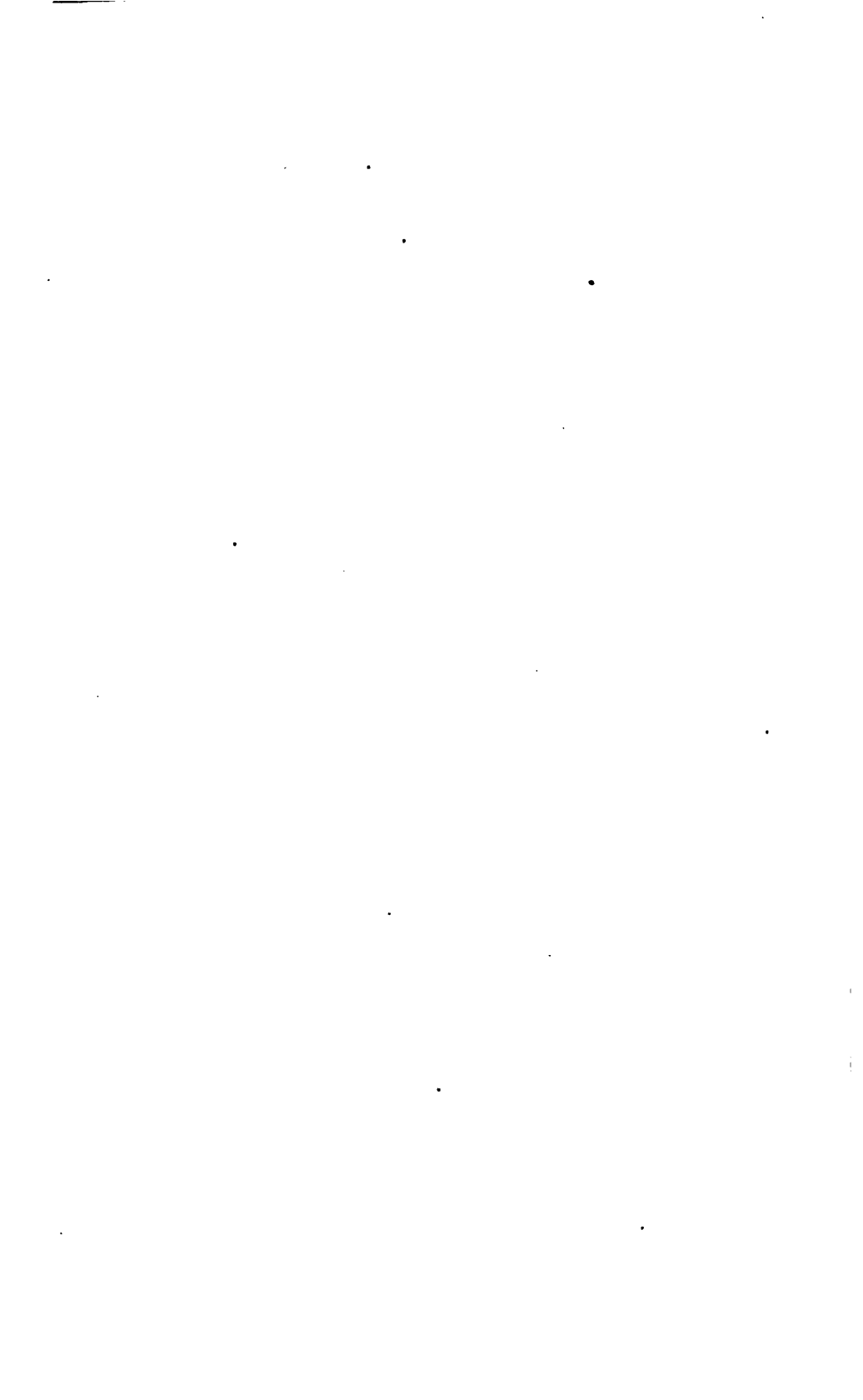
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INDIANA REPORTS.

VOL. XVII.



Q16

REPORTS

OF

CASES ARGUED AND DETERMINED

IN THE

SUPREME COURT OF JUDICATURE

OF THE

STATE OF INDIANA,

WITH TABLES OF THE CASES AND PRINCIPAL MATTERS.

BY BENJAMIN HARRISON, A. M.,

OFFICIAL REPORTER.

VOL. XVII.

CONTAINING THE CASES DECIDED AT THE NOVEMBER TERM, 1861, TOGETHER
WITH CERTAIN CASES DECIDED AT PREVIOUS TERMS, AND HELD
OVER ON PETITIONS FOR REHEARING.

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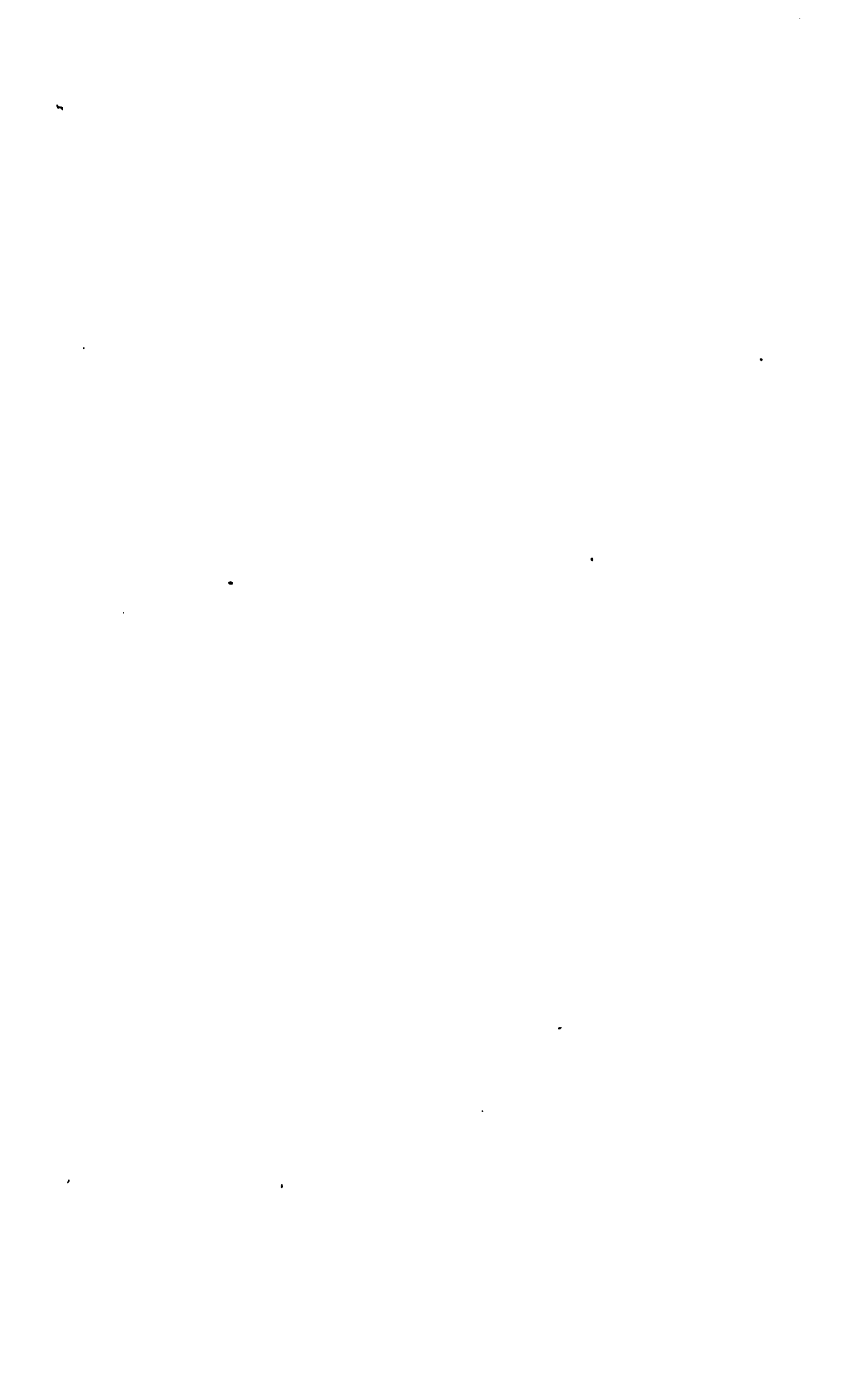
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JUDGES
OF THE
SUPREME COURT OF JUDICATURE
OF THE
STATE OF INDIANA,
DURING THE PERIOD COMPRISED IN THIS VOLUME.

ANDREW DAVISON,
JAMES L. WORDEN,
JAMES M. HANNA,
SAMUEL E. PERKINS,

Judge DAVISON was Chief Justice at the *November Term, 1861.*



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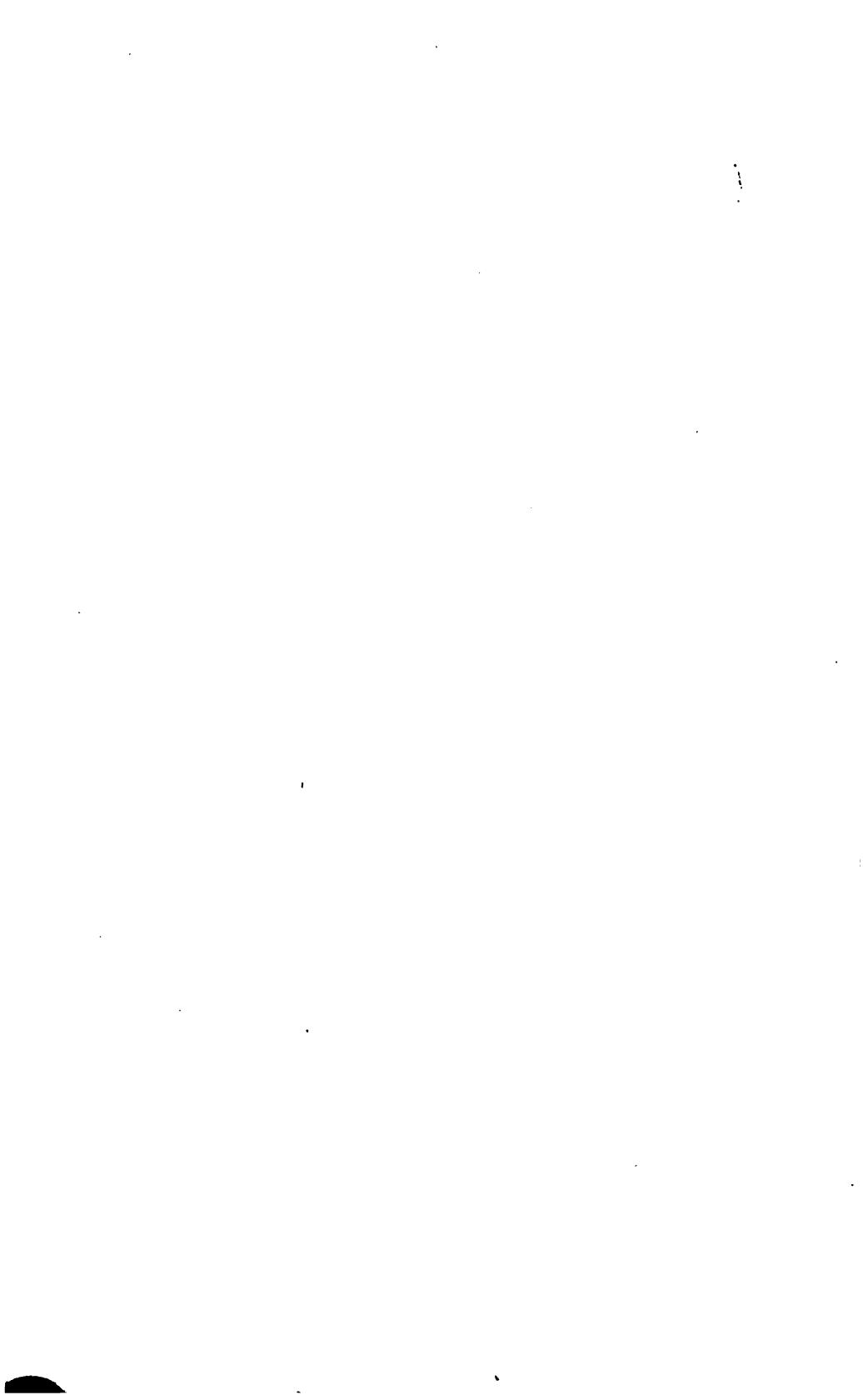
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CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT OF JUDICATURE

OF THE

STATE OF INDIANA,

AT INDIANAPOLIS, NOVEMBER TERM, 1861, IN THE FORTY-SIXTH YEAR OF THE STATE.

Rose and Another v. Comstock and Another.

Suit against *A.*, *B.*, and *C.* upon a promissory note alleged to have been made by them, by their co-partnership name of *A. & Co.*, to the order of *A.*, and by him indorsed to the plaintiff. *A.* made default. *B.* and *C.* answered, that *A.* had caused the clerk of the co-partnership to make said note and deliver it to him, and that he had indorsed it to the plaintiff for a private debt, all of which he well knew, &c. Without replying to the answer of *B.* and *C.*, the plaintiff had the damages assessed against *A.*, on his default, and took final judgment against him. No further steps were taken in the cause at that term, nor was the cause continued as to *B.* and *C.* At the next term of the Court, the plaintiff asked leave to file a reply to the answer of *B.* and *C.*, which was objected to by them, and a motion interposed to strike the cause from the docket. Pending this motion, *A.* moved, on affidavit, to set aside the default and judgment against him, and the plaintiff confessing the errors alleged, the default and judgment were set aside. Thereupon, the Court overruled the motion to strike the cause from the docket, and permitted a reply to be filed. *A.* was again defaulted; trial by the Court, and judgment against all the defendants.

Nov. Term, *Held*, that the first judgment against *A.* was properly taken, so far as any question as to joint liability was concerned, as the facts pleaded by *B.*

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and *C.*, at most, only defeated the action as to them.
Held, also, that by failing to reply to the answer of *B.* and *C.*, and by taking final judgment against *A.*, the plaintiff abandoned the suit as to *B.* and *C.*, and a discontinuance of the cause, as to them, resulted.

Held, also, that this case does not come within § 369, 2 R. S. 1852, p. 121, which provides that the Court may, in its discretion, render judgment against one or more defendants, leaving the action to proceed against the others, whenever a several judgment is proper; first, because the Court did not exercise this discretion, or make any order that the case should be left to proceed; and, second, because this was not a case where a several judgment could be rendered against *B.* and *C.*, since, if they were liable at all, it was jointly with *A.*

Held, also, that when final judgment was taken against *A.*, *B.* and *C.* were out of Court, and the cause was, as to them, finally disposed of, and it was error to take any subsequent proceedings against them.

Monday,
November 23.

APPEAL from the *Vigo* Circuit Court.

WORDEN, J.—This was a suit by *Comstock* and *Aber* against the appellants, and *Andrew Downing*, upon a promissory note.

It is alleged in the complaint that the defendants were partners, trading under the name and style of *A. Downing & Co.*, and that they, as such partners, made their note to *A. Downing*, who indorsed it to the plaintiffs.

Downing made default. At the *March* term of the Court, 1859, *Rose* and *Peck* appeared, and filed an answer, alleging, in substance, that *Downing*, one of the members of the firm, caused one *Irons*, the clerk and agent of the firm, to make and deliver the note to said *Downing*, who indorsed it to the plaintiffs for his private and individual debt, and not for any debt of the firm, and that the plaintiffs had full knowledge of all the facts.

At the same term of the Court, after the answer of *Rose* and *Peck* was filed, the plaintiffs, without replying to the answer of *Rose* and *Peck*, had *Downing* called and defaulted, and the damages assessed by the Court, and took final judgment against him for the amount due on the note, and costs.

No other steps were taken in the cause at that term of the Court. *Rose* and *Peck* were not further noticed, nor was their answer; nor was the cause continued as to them, or otherwise disposed of, unless the taking of judgment against *Downing* put an end to the cause as to them.

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COMSTOCK.

At the next term of the Court, the plaintiffs appeared, and asked leave to file a replication to the answer of *Rose* and *Peck*, to which they, by counsel, objected, and moved the Court to strike the cause from the docket, on the ground that as the plaintiffs had, at the previous term, taken final judgment against *Downing*, they were discharged, and the cause at an end. Pending this motion, *Downing* appeared, and, on affidavit filed, moved the Court to set aside the judgment which had been rendered against him by default, at the previous term. It is evident from the affidavit of *Downing*, that there was no very substantial ground for setting aside the default as to him, but the plaintiffs saying that they "confessed the errors alleged," the default was set aside.

Thereupon, the Court overruled the motion to strike the cause from the docket, as to *Rose* and *Peck*, and gave the plaintiffs leave to reply to their answer, to which exception was duly taken. A replication was filed, denying the matters set up in the answer of *Rose* and *Peck*, and thereupon *Downing* was again defaulted. *Rose* and *Peck* applied, on affidavit filed, for a continuance, but the motion was overruled. The cause was tried by the Court, as to *Rose* and *Peck*. The Court found for the plaintiffs, assessing damages against *Downing*, as well as *Rose* and *Peck*, and rendered final judgment against all the defendants.

Rose and *Peck*, only, appeal.

The first question arising upon the record, relates to the effect of taking the first judgment against *Downing*; and the solution of this question, in our opinion, settles the whole case.

It may be observed that that judgment was rightfully enough taken, so far as any question as to joint liability is concerned.

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Rose and Peck had pleaded matter which, at most, defeated the action as to them only. The matter thus pleaded, while it showed that *Rose and Peck* were not liable as makers of the note, showed that *Downing* was solely liable thereon. It was a case where a several judgment against *Downing* was proper. Had issue been taken on the answer of *Rose and Peck*, and found against the plaintiffs, they still would have been entitled to have damages assessed against *Downing* on his default, because the matter pleaded did not defeat the liability of *Downing*. Herein the case differs from that of *Sutherlin et al. v. Mullis*, at the present term, *post*, p. 19. The case is more like that of *Hubbell v. Woolf*, 15 Ind. 204. See, also, *Parker v. Jackson*, 16 Barbour, 33, a case quite in point here.

The plaintiffs, by failing to reply to the answer of *Rose and Peck*, and by taking final judgment on the default, against *Downing*, we think, clearly abandoned the suit as against *Rose and Peck*. Whether the judgment, for all purposes, merged the note, we need not decide, but the taking of final judgment against *Downing* alone, under the circumstances, operated as a discontinuance of the cause, as to the other parties, and put an end to the suit. The code provides that "every material allegation of new matter in the answer, not specifically controverted by the reply, shall, for the purposes of the action, be taken as true." 2 R. S. 1852, § 74, p. 44. The matters set up in the answer of *Rose and Peck*, not being controverted, must have been, for the purposes of the action, taken as true; and the effect thereof, as a bar to the action against them, was admitted by the plaintiffs in taking judgment against *Downing* alone.

We have, however, a statutory provision that should, perhaps, be specially noticed. It is provided that "in suits against several defendants, the Court may, in its discretion, render judgment against one or more of them, leaving the action to proceed against the others, whenever a several judgment is proper." 2 R. S. 1852, § 369, p. 121.

The case does not come within this provision, for two reasons:

First.—The cause was not continued, or left to proceed, by the order of the Court, in the exercise of its discretion, as to the defendants *Rose* and *Peck*. On the contrary, no order was made by the Court in this respect. The plaintiffs could not, of their own volition alone, take judgment as to one, and leave the cause to proceed as to the others. This can only be done by the exercise of the discretion vested in the Court; and the exercise of such discretion can only be shown by an order of the Court, to that effect. *Bacon v. Comstock*, 11 Howard's Prac. R. 197.

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No such order having been made, the cause can not be regarded as having been left to proceed against any of the defendants; on the contrary, it was terminated as to all of them.

Second.—This is not a proper case for such an order, which can only be made in cases where a several judgment is proper. Now, although a several judgment against *Downing* was proper, under the facts shown, yet it could not be as against *Rose* and *Peck*; for if they were liable at all, they were only liable jointly with *Downing*, and a several judgment against them could not be rendered; hence it would be useless to continue the cause, or let it proceed, as to them.

The judgment against *Downing* might, perhaps, be regarded as merging the note, so as to bar an action thereon against *Rose* and *Peck*. If so, we express no opinion as to the effect, in that respect, of the action of the Court in setting it aside. If setting aside the judgment would restore to the parties all the rights and liabilities upon the note, which attached before the judgment was rendered, still, it could not put *Rose* and *Peck* back into Court as parties to the suit, the cause having been, at the previous term, finally disposed of and ended. *Rose* and *Peck* were out of Court; and it was error to take proceedings against them in a cause, which, as to them at least, had been finally disposed of.

The Court below, in our opinion, erred in not striking the cause, as to *Rose* and *Peck*, from the docket, and in permitting a reply to be filed to the answer which they had

Nov. Term, 1861. previously filed, and in requiring them to enter upon the trial of the cause.

GODFREY v. GODFREY. *Per Curiam*.—The judgment against the appellants is reversed, with costs. Cause remanded, &c.
John P. Usher, for the appellants.
James H. Vawter, for the appellees.

Mr. Usher, for appellants: The note being joint, the judgment against *Downing* was an extinguishment of the note and debt. It was merged in the judgment. *Woodworth v. Spofford*, 2 McLean, 168; *Clinton Bank of Columbus v. Hart*, 5 Ohio R. 33; 18 Johns. R. 481.

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GODFREY v. GODFREY and Others.

As the Circuit Court is a court of general and unlimited jurisdiction, its authority to proceed in the trial of a cause need not affirmatively appear in the complaint; and hence in a petition for partition of lands, it need not be averred that the land lies in the county where the suit is brought. An objection to a petition for partition, on account of the indefinite description of the land sought to be partitioned, can not be taken by demurrer, but must be taken by a motion to have the pleading made certain and definite.

The word "holding," as used in § 1 of our statute concerning the partition of lands, (2 R. S., p. 329.) does not require actual occupancy, but is equivalent to "owning," or "having title to" lands.

All questions of title and possession may, under the statute, be settled in a suit for the partition of lands.

Monday,
November 25.

APPEAL from the *Miami* Circuit Court.

WORDEN, J.—This was a petition by the appellant against the appellees, for the partition of a certain tract of land. *Miller* demurred to the petition, and the demurrer having been sustained, the petitioner appeals.

The petition sets out, in substance, that by a treaty made October 23, 1826, between the *United States* and the *Miami* tribe of *Indians*, one section of land was granted to *Louison Godfrey*, a plat of which was filed and made a part of the

petition. From the plat filed, it appears that the land lies in township twenty-seven north, of range three east, but the particular section, or other definite description, does not appear. It is alleged that *Louison Godfrey*, in his lifetime, sold and conveyed three hundred and forty acres of the tract, leaving in himself three hundred acres in the north part of the section, of which he died seized. It is alleged that *Louison Godfrey* left children and grand children, to whom the three hundred acres descended, one of whom was the petitioner, *Shin-go-quá Godfrey*, and the others are made defendants. It is also alleged that *John W. Miller* and *Edward A. Godfrey*, (who are not heirs of *Louison*,) each claim and pretend to have a title to the three hundred acres, or some part thereof, but the nature of their claims and title, and the amount of their respective interest, the petitioner did not know; that the petitioner does not know whether *Miller* and *Edward A. Godfrey* have any interest in the lands, or not, but as she is informed that each of them pretend to have an interest and ownership therein, they are made defendants. That the petitioner is entitled to one-fifth of the land, by inheritance from her grand father, &c. Partition is prayed.

In support of the decision below, in sustaining *Miller's* demurrer, four objections are made to the petition, in the brief of his counsel:

1. "It does not show that the lands lie in *Miami* county; and therefore it does not appear that the Court had jurisdiction."

In the case of *Brownfield v. Weicht*, 9 Ind. 394, it was held that the Circuit Court, being one of general and unlimited jurisdiction, its authority to proceed in the trial of a cause need not affirmatively appear in the complaint. The objection for want of jurisdiction, if it exists, may be raised by answer, or at any subsequent stage of the proceedings. That case is decisive of the point here.

2. "The land is not sufficiently described."

There is, to be sure, no definite description of the land contained in the complaint, but the land sought to be partitioned is the north part of the section granted, by the treaty mentioned, to *Louison Godfrey*; and *cerum est quod certum reddi potest*.

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Nov. Term, 1861. The treaty is a public law, and may be noticed by the Courts; hence, if that sufficiently describes the land, perhaps further

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particularity in the description would be unnecessary. We do not, however, decide that there is a sufficient description of the land, either directly, or by reference to the treaty. But we think the uncertainty in description can not be taken advantage of on demurrer. There are facts stated sufficient to constitute a cause of action. Those facts are, that three hundred acres in the north part of the section granted to *Godfrey* by the treaty, descended to his heirs, of whom the petitioner is one, and entitled to partition thereof. The uncertainty in the description can not be regarded in the same light as the omission of a fact necessary to be stated, in order to constitute a cause of action. The uncertainty in the description might have been obviated by a motion to require the pleading to be made definite and certain, by amendment. Code, § 90.

3. "The complaint only shows who are the owners of four-fifths of the land, and does not aver that the petitioner does not know who is the owner of the other fifth."

There is a little confusion in the statement of the respective shares of the children and grand children of the reservee; and perhaps the shares, as set out, do not exhaust the whole of the land. But the petition states that the land descended to those children and grand children, and they are all made parties. We can not perceive how *Miller*, who alone demurred, is interested as to the question of a proper division between the descendants of the reservee. Those descendants were made parties, and whether the petition set out the supposed rights of each properly, or not, made no difference to *Miller*; as a judgment in his favor would bind them, and a judgment against him, would render it immaterial to him how the land was partitioned among them.

4. "The petitioner can not have partition of the premises, because *Miller* is in possession of the whole, claiming an adverse title."

It is claimed that the petitioner can not have partition, without having possession. The contrary was held, in the case of *Foust v. Moorman*, 2 Ind. 17. The present statute

on the subject of partition, provides that "all persons holding lands," &c., may have partition. We do not construe the word "holding," thus used, as requiring actual occupancy, but as equivalent to owning, or having title to lands, &c.

It does not appear from the complaint that *Miller* is in possession, but simply that he claims title. But supposing he were in possession, claiming adversely, the objection, we think, would not be well taken. The statute provides, that "Any person interested in such estate may appear and plead any matter tending to show that the petitioner ought not to have partition, as prayed for; and the further pleadings shall be conducted as in actions at common law, until an issue in law, or in fact, shall be joined, which shall be determined as in other cases. If any person, not named in the petition, shall appear and plead as a defendant, or allege any title to any part of the premises, the petitioner may reply that such person has no estate in the premises, and may pray judgment if he shall be admitted to object to the petition; and the petitioner may likewise reply, in answer to such plea, any other matter, in like manner as if he had not disputed such person's right to appear." 2 R. S. 1852, p. 330, §§ 5, 7.

These provisions clearly contemplate that any person, not made a party, may appear and set up title in himself to the premises sought to be partitioned. (1) Where such title is set up, and found against such person, no reason is perceived why partition should not be made among those to whom the land belongs, although such person may have been in possession. Formerly, when proceedings for partition were regarded as chancery proceedings, where the legal title was disputed, the course was to send the plaintiff to law to have that title established, before proceeding in chancery for partition. *Fous' v. Moorman*, *supra*. The distinction between actions at law, and suits in equity, is abolished by the code. Actions for partition are governed by the code. 2 R. S. 1852, p. 174. Courts now having jurisdiction in partition, have the power of settling questions of title. *Wolcott v. Wigton*, 7 Ind. 44. There seems to be no good reason why all questions of title and possession, may not, under the statute, be settled in the suit for partition. Perhaps the

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Nov. Term, 1861. parties would be entitled to a new trial, as provided for in other cases involving titles, without cause shown; but this point need not be decided, as it does not arise.

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v.
MAULSBY.

Miller, in this case, did not come and ask leave to make defense, but was made defendant to the petition originally, which was just as well. It is alleged that he claimed title, and the proceedings would bar him, unless he came in and set up his claim if he had any. Instead of demurring to the complaint, we think he should have set up his claim to the land, if he had any such claim.

Per Curiam. — The judgment is reversed, with costs. Cause remanded, &c.

J. M. Wilson and *W. Z. Stuart*, for the appellant.

N. O. Ross and *R. P. Effinger*, for the appellees.

(1) *Seemle*, that one claiming the separate and entire ownership of lands, can not be made a defendant to a proceeding for the partition of the lands, instituted by others claiming as tenants in common. *Baker v. Riley et al.*, 16 Ind. 479.

BROWN v. MAULSBY and Another.

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A condition in a note, or other contract for the payment of money, that if not paid at maturity, interest will be charged from the date of the contract, is valid.

So a condition that if a given installment of a debt shall not be paid at a given time, the whole debt shall become due, is valid.

A creditor may make a condition in his contract, that if the debtor suffers himself to be sued for the debt, he shall pay the attorney's fee of the creditor, as well as the taxable costs of the case.

When a party covenants to perform certain acts, other than the payment of money, the failure to perform which may occasion damages uncertain in amount, the parties may agree in advance as to what the damages shall be taken to be.

A promise to pay money does not fall within the class of cases to which the doctrine of liquidated damages applies; the rate of interest allowed

by law being the measure of damages for delay in the payment of money. Nov. Term,
1861.

APPEAL from the *Henry* Common Pleas.

PERKINS, J.—Suit upon a note, as follows:

BROWN
v.
MAULSBY.

“December 31, 1860.

Monday,
November 25.

“Eight days after date, for value received, we, or either of us, promise to pay *Isaac Brown* the sum of two hundred and sixteen dollars and twenty-seven cents, if paid when due; if not, we agree to forfeit and pay twenty per cent. damages for disappointment; waiving valuation and appraisement laws.

“J. B. MAULSBY,
“JACOB CLAPPER.”

The defendant answered, that there was no consideration for the twenty per cent. damages; and that they were usury.

The plaintiff replied in general denial of the answer.

On the trial, the note was all the evidence given. The Court found for the plaintiff, the amount of the note, at six per cent. interest, refusing to allow the twenty per cent. damages.

The question, therefore, is on the *prima facie* import of the face of the note.

A man may charge legal interest for the use of his money, if he pleases. Hence, he may make its payment conditional; as that if his money is paid him by a given day, no interest will be exacted; but if not, that interest will be exacted. *Gully v. Remy*, 1 Blackf. 69; Ind. Dig. 529.

Again, a creditor may fix his own time for the payment to him of debts due; hence, he may make the time of falling due conditional; as that if a given installment be paid on a given day, the balance may remain unpaid for a certain further period; but, on the other hand, if such installment shall not be paid on a given day, then the whole debt shall be immediately due. These are legitimate matters of contract within the law of the land. *Ausem v. Byrd*, 6 Ind. 475.

So, legal interest may be taken in advance. *Cole v. Loc'h-har'*, 2 Ind. 631; Ind. Dig. 778; *Haas v. Flint*, 8 Blackf. 67. So, it has been held in *Indiana*, though the point is ruled the other way in *Ohio*, that a creditor may make it a condition

Nov. Term, 1861. that if his debtor suffers himself to be sued for the debt, he shall pay the attorney's fee of the creditor, in the suit, as well as the taxable costs of the cause. *Billingsley v. Dean*, 11 Ind. 331.

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v.
MAULESBY.

Again, where a party covenants to perform certain acts, or a certain act, other than the payment of money, the failure to perform which may occasion damages, uncertain in amount, and to be estimated by a jury, the parties may agree in advance as to what the damage shall be taken to be, and the agreed amount may be recovered. But in this class of cases, it is always to be considered, and is often a question of great difficulty, whether the sum stipulated is a penalty, or liquidated damages. If the former, then it does not fix the amount to be recovered; if the latter, it does. Ind. Dig. p. 391; *Carpenter v. Lockhart*, 1 Ind 434; *Miller v. Elliott*, *id.* 484; *Duffy v. Shockey*, 11 Ind. 70.

If the note, in the case at bar, fell within the class of covenants of which we are speaking, it might be well argued that the sum stipulated to be forfeited on a failure to perform the act promised, was a penalty, and not liquidated damages; but the note does not fall within the class of covenants, or promises, to which the doctrines of penalty and liquidated damages are applied. The note is for the payment of money; and where the payment of a sum of money is the act to be done, no nearer approximation to the damages sustained for its omission, says *Gilchrist, J.*, in *Meal v. Wheeler*, 13 N. H. Rep. 351, can be arrived at, than the legal rate of interest; and this is the rule of damages the law has fixed for delay in the payment of money. 2 Parsons on Cont. 436. This proposition appears to have been first asserted by Lord *Loughborough*, in *Orr v. Churchill*, in 1789, a case reported in 1 Henry Blackstone, p. 227, and it seems to have been adhered to. Sedgwick on Dam. p. 400. The consequence is, that in contracts for the payment of money, agreements of this kind, to pay damages, amount to no more, at all events, than penalties in bonds.

It would certainly be against public policy; would have the effect to abrogate all laws against usury, and place the weak and embarrassed entirely in the power of the money

capital of the land, should such a stipulation as that contained in the note sued on be held valid. Nov. Term,
1861.

Per Curiam.—The judgment below is affirmed, with costs.

James Brown, for the appellant.

J. H. Mellett and *E. B. Martindale*, for the appellees.

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v.
JACKSON.

HOLCROFT and Others v. WRIGHT and Another.

APPEAL from the *Crawford* Common Pleas.

*Monday,
November 25.*

Per Curiam.—The judgment in this case is reversed, with costs, and the cause remanded for another trial, on the authority of *Holcroft v. Halbert*, 16 Ind. 256.

R. & H. Crawford, for the appellants.

W. Q. Gresham, for the appellees.

BLACK v. JACKSON.

Errors in the amount and form of the assessment and judgment below, will not be noticed in the Supreme Court, when no application has been made to the Court below, to correct the alleged error.

APPEAL from the *Delaware* Common Pleas.

*Monday,
November 25.*

Per Curiam.—Suit on a note, and to foreclose a mortgage. Judgment by default. Errors in the amount and form of the assessment and judgment are complained of, but the record does not show any attempt to be relieved therefrom, in the Court below, and therefore we can not consider the questions made relative thereto.

It is insisted, at some length, that the decisions of this Court have not been uniform, but are contradictory as to this question of practice. We have examined the cases

Nov. Term, 1861. referred to, and do not think that any of them show, affirmatively, that the proper steps had not been taken in the lower Court to be relieved from the effects of the default. But if they did, we are satisfied that the line of decisions we are now following, is correct.

CRESSEY
v.
WEBB.

The appeal is dismissed, at appellant's costs.

Thomas J. Sample, for the appellant.

W. Brotherton, for the appellee.

CRESSEY and Others v. WEBB.

On *January 22, 1856*, *A.*, by his agreement in writing, sold, and agreed to convey to *B.*, lot No. 70, in *Woods'* addition to the city of *Indianapolis*, for the sum of \$800; \$400 of the purchase money to be paid *March 1, 1856*, and the residue *March 1, 1857*; a deed to be made on the payment of the first installment of the purchase money, and the residue to be secured by a mortgage on the premises. The first payment was not made on *March 1, 1856*, nor was a deed then tendered. On *May 2*, however, *B.* paid \$400, and the agreement was so far modified, as to extend the time of making the deed until *May 2, 1857*. *A.* and wife, at the same time, executed to *B.* a mortgage upon lot No. 71, in said addition, the separate property of the wife, to secure the payment of said sum of \$400, so paid by *B.* on the purchase of lot 70. Contemporaneously with the execution of said mortgage, *B.* executed a written agreement, reciting the making of the mortgage, and conditioned that the same should be void, on the conveyance of lot No. 70 to him, on or before *May 2, 1857*. Before the time last named, *A.* died intestate, without having conveyed said lot, leaving his widow and one child his heirs surviving. *B.* continued in the occupation of said lot No. 70, without having paid or tendered the balance due on the lot. Suit by an assignee of *B.* upon the mortgage, to recover the \$400.

Held, that the mortgage and written instrument, being contemporaneous, and having reference to the same subject matter, must be held to be one contract; and that the original agreement was not annulled by the new, but merely modified as to time of payment, and by securing the making of a conveyance by a mortgage on another lot.

Held, also, that the suit, though based upon a mortgage, was in fact a suit to recover purchase money, advanced upon a contract for the sale of real

estate, and the plaintiff could not recover, unless *B.* had placed himself in a position to rescind the contract; and this he had not done, as he still held possession of the premises, under the contract of sale.

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1861.

CRESSEY

v.

WEBB.

Monday,
November 25.

APPEAL from the *Marion* Common Pleas.

DAVISON, J.—This was an action by the appellee, who was the plaintiff, against the appellants, to foreclose a mortgage on lot No. 71, in block No. 40, in *Woods'* addition to the city of *Indianapolis*. The mortgage bears date, *May* 2, 1856; was executed by *Sarah Bishop*, now *Sarah Cressey*—and her then husband, *John Bishop*, to one *Aaron W. Banghart*, to secure the payment of \$400, with interest, on or before *May* 2, 1857, and was assigned by the mortgagee to *John Hoss*, who assigned it to the plaintiff. It is averred in the complaint, that on *November* 10, 1856, *John Bishop* died, leaving *Sarah Bishop*, his widow, and *Lewis Bishop*, his heir at law; that *Geo. Durham* was duly appointed administrator of the decedent's estate, and that *Sarah*, the widow of the deceased, is now intermarried with *William Cressey*. And further, it is averred that *Sarah* had, at the date of the mortgage, and still has, the legal title, in fee simple, to the mortgaged premises. Plaintiff demands judgment for \$500, also a decree of foreclosure, &c., and an order to sell the lands described in the mortgage, for the payment of such judgment, &c.

The answer of *Sarah Cressey* contains a *general denial*, and three special defenses. To the 2d, 3d and 4th defenses, demurrers were sustained. *Geo. Durham*, administrator of the estate of *John Bishop*, also filed his answer, which, upon demurrer, was adjudged insufficient; and *Lewis Bishop*, being a minor, answered by his guardian *ad litem*. The issues were submitted to the Court, who, upon final hearing, rendered a judgment and decree in accordance with the prayer of the complaint. As the facts set forth in the second defense are mainly relied on, as an effective bar to the action, they alone will be noticed. They are these: On *June*, 22, 1856, *John Bishop*, the then husband of *Sarah Cressey*, and *Aaron W. Banghart*, the mortgagee, entered into an agreement, in writing, whereby he, *Bishop*, sold to *Banghart* lot No. 70, in block No. 40, in *Woods'* addition

Nov. Term, 1861. *CRESSEY* v. *WARR*. to the city of *Indianapolis*, for \$800; of which, \$400 was to be paid on *March 1*, 1856, and the residue on *March 1*, 1857. Upon full payment of the first installment, *Bishop* was to make and deliver to *Banghart*, a deed in fee simple, and the residue of the purchase money was to be secured by a mortgage on the premises. Pursuant to the sale thus made, *Banghart* took possession of the property, but did not pay, or offer to pay, on *March 1*, 1856, as stipulated in the agreement; nor did *Bishop*, at that time, deliver or tender to him a deed for the premises. *Banghart* continued in such possession until *May 2*, 1856, when he paid on the agreement \$400. At that date, the agreement was so modified as to extend the time of making said deed, to *May 2*, 1857, but in all other respects, it was to remain unaltered. And to secure the making of such deed, the mortgage in suit, was, at its date, made to *Banghart*; but, at the same time, he, *Banghart*, executed a written instrument, which is, in effect, as follows:

"Whereas, *Sarah Bishop*, and *John Bishop*, her husband, have this day executed to me a mortgage on lot No. 71, in block No. 40, in *Woods'* addition, &c., to secure the payment of \$400, with interest, on the 2d of *May*, 1857. Now, if the said *Sarah* and *John Bishop* shall make, or cause to be made and delivered to me, a good and sufficient deed for lot No. 70, in block No. 40, in *Woods'* addition, &c., on or before the 2d of *May*, 1857, then I agree, and am bound, to deliver up said mortgage to be canceled. But, if the deed for lot No. 70 shall not be given, as above specified, then the right to foreclose said mortgage shall be complete, and this instrument is to be void, &c. And if said *Sarah* and *John Bishop* shall pay the \$400, with interest, as in the mortgage specified, and fail to make the deed, as before stipulated, then they are to pay me the value of the improvements which I may make on said lot, now occupied by me, to be determined by disinterested persons."

"Dated *May 2*, 1856. Signed, "AARON W. BANGHART."

It is averred that *Bishop* and his wife were not, nor was either of them indebted to *Banghart*, at the date of the

mortgage, \$400, or any other sum; but that the money so paid to *Bishop*, was paid on account of the original agreement for the sale of lot No. 70. And further, it is averred that *Bishop*, prior to *March* 2, 1857, the day on which the deed for said lot was to be made, died intestate, leaving his wife and child, as in the complaint stated; and that *Banghart* did not at that date rescind the contract of sale, but still continues to hold the lot under and by virtue of said agreement; nor has he paid or offered to pay the balance of the purchase money.

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CRESKEY
v.
WEBB.

The answer prays that *Banghart* be made a party, &c., and that the Court will appoint a commissioner, and direct him to make to the party entitled thereto a deed for the premises sold, &c.

These facts are admitted by the demurrer, and the question to settle is, are they sufficient to defeat a recovery on the mortgage? It must be conceded that the mortgage and written instrument, over the signature of *Banghart*, have relation to the same subject matter, and having been executed contemporaneously, must be held as one contract. *Fellows v. Kress*, 5 Blackf. 536; Chitty on Cont. 40, note 1. And being thus construed, they have direct reference to the agreement for the sale of lot No. 70. The mortgage and written instrument do not, however, vacate the original agreement, but continue it in force, except so far as they extend the time of executing the deed, and secure the title by the pledge of another lot. That they were simply intended to modify, and not annul, the prior agreement of sale, may be noted from the fact that in them, nothing is said in relation to the payment of the second installment, due *March*, 1857. True, the written instrument and mortgage, when construed together, distinctly say that "If the deed for lot 70 shall not be made by *May* 2, 1857, then the right to foreclose the mortgage shall be complete." Still, the defendants have an interest, growing out of the transaction between the parties to the agreement, which they have a right to enforce. And it is believed to be the intention of the code, to allow such matters as are stated in the pleading in question, to be set up in defense; "so that the whole controversy between the parties may be settled in one action, and that either the

Nov. Term, 1861. plaintiff or defendant should have such relief as the nature of the case requires." Van Santvoord's Pl., p. 546, *et seq.*

HOLCROFT

v.

HALBERT.

The suit in this case, though the demand upon which it is based is secured by mortgage, is really a suit to recover purchase money advanced upon a contract for the sale of real estate; and the plaintiff obviously can not recover, unless the vendee of the estate sold has placed himself in a position to rescind the contract. This, it seems to us, he has not done, because he still holds possession of the premises, under the contract of sale. Evidently, "a party can not retain the subject of the contract, and refuse to pay for it." *Gnar v. Lockridge*, 9 Ind. 96. Moreover, the vendee himself was in default, in failing to pay, or tender, an installment of the purchase money which fell due March 1, 1857, and prior to the time agreed on for making the deed. But the contract of sale still remains in force; has not been rescinded, nor has any attempt to rescind it been made. The result is, the plaintiff is not entitled to recover the purchase money advanced. There are other points of error made by the appellant, but the ground assumed in this opinion renders a notice of them unimportant.

Per Curiam.—The judgment is reversed, with costs Cause remanded, &c.

W. Wallace and Benjamin Harrison, for the appellants.

D. McDonald and J. Milner, for the appellee.

HOLCROFT and Others v. HALBERT and Another.

Monday,
November 25.

APPEAL from the *Crawford* Common Pleas.

Per Curiam.—The judgment in this case is reversed, with costs, and the cause remanded for another trial, on the authority of *Holcroft et al. v. Halbert et al.*, 16 Ind. 256.

R. & H. Crawford, for the appellants.

W. A. Porter, for the appellees.

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1861.

SUTHERLIN and Another v. MULLIS.

SUTHERLIN
v.
MULLIS.

17	19
130	422

Suit against *A.* and *B.* upon a promissory note. The defendants answered, separately: 1. Usury, going to the entire note; 2. Want of consideration. Reply to the answer setting up usury, that defendants had before that time filed their bill in chancery, alleging the matters now set up in the first paragraph of their answers, and asking that the plaintiff be enjoined from collecting said note; that upon the hearing of said chancery cause, it was decreed that plaintiff be enjoined from enforcing the collection of said note, except as to the sum of \$296, with interest from the date of the note. Afterward, *A.* withdrew his answer, and a default was entered against him.

Held, that the defendants having instituted a suit to cancel the note, as usurious, and having obtained a decree establishing the alleged usury in part only, could not afterward go behind the decree, and set up the same defense to the residue of the note.

Held, also, that had the answer of *A.* stood, neither of the defendants could have been a witness for the other, because the defense set up by each, had it succeeded, would have defeated the action as to both.

Held, also, that in actions *ex contractu*, a plea by one defendant enures to the benefit of all the defendants who do not plead; and if one of several defendants succeeds, upon a plea going to the merits of the action, the plaintiff is precluded from obtaining any benefit from a default suffered by the other defendants; and, hence, notwithstanding the default as to *A.*, he was still jointly interested in the defenses pleaded by *B.*, and was not a competent witness to prove them.

APPEAL from the *Orange* Circuit Court.

Monday,
November 25.

WORDEN, J.—Action by *Mullis* against the appellants, upon a promissory note made by the latter to the former.

The defendants answered separately:

First.—Usury, setting out the circumstances, and going to the entire note.

Second.—Want of consideration.

The plaintiff replied to the first paragraphs of the several answers, that before that time, to wit, &c., the defendants had filed a bill in chancery in the *Orange* Circuit Court, against the plaintiff herein, setting up the same matters in their bill as are now alleged in the first paragraphs of the answers, praying that the plaintiff herein be enjoined from the collection of said note; and that upon the hearing of the

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SUTHERLIN
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MULLIN.

cause, at the *September* term of the Court, 1853, it was decreed that the plaintiff herein be perpetually enjoined from attempting in any way to enforce the collection of the note, except as to the sum of \$296.25, with the interest thereon from *January* 18, 1845, the date of the note.

Issue was taken on the second paragraphs of the several answers.

Maxwell afterward withdrew his answer. The issues were tried by a jury. Verdict and judgment for the plaintiff, for a sum equal to \$296.25, and interest thereon from the date of the note.

In the brief of counsel for the appellants, a point is made upon the ruling of the Court upon a demurrer, but as the assignment of errors does not embrace the point, we pass it.

On the trial, the plaintiff offered in evidence the record of the chancery suit pleaded by him, to which objection was made by the defendant, and overruled. The defendant *Sutherlin* offered his co-defendant *Maxwell* as a witness in his behalf, but his testimony was rejected, on the plaintiff's objection.

These two rulings present the only questions involved in the case.

The objection to the decree in chancery is stated as follows, in the brief of counsel, viz., "Either the note was merged in the decree, or it was not. If merged, the plaintiff's only remedy was to enforce the decree, and no action could be maintained on the note; and the plaintiff therefore replied himself out of Court. Or if it was not merged, but was open to the plaintiff to sue upon it, and support it by evidence, it was equally open for *Sutherlin* to impeach and overthrow it by evidence. If the decree did not estop the plaintiff, it did not this defendant, and was no bar to his defense." However forcible this reasoning might be in some cases, it does not appear to be conclusive against the record offered in evidence. From the record offered, it appears that the Court found the note to be usurious, except as to the sum named, and accordingly decreed that the plaintiff be perpetually enjoined from collecting any more. Perhaps the Court might have rendered a decree requiring

the residue to be paid, thus merging the entire note in the decree; or perhaps might have required payment to be made of what was due, as a condition of granting the relief claimed; but nothing of this kind was done. The decree, while it left the plaintiff free to collect the residue of his note by action, determined the whole question of usury involved in the transaction. The defendants, having instituted a suit to cancel the note as usurious, and having obtained a decree establishing the alleged usury in part only, can not now go behind the decree, and set up the same defense to the residue of the note. There was no error in admitting the record.

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MULLIS.

We come to the other question. Had the pleading of *Maxwell* stood, neither of the defendants could have been a witness for the other, because the defense set up by each, had it succeeded, would have defeated the action as to both. There would have been no question within the issues, in which they would not have been jointly interested. *Vide Blodget v. Morris*, 14 N. Y. 482.

But it is insisted that inasmuch as *Maxwell* had withdrawn his pleading, he was a competent witness for his co-defendant, because as judgment might be rightfully rendered against him for the amount of the note and interest, although *Sutherlin* should succeed in his defense; that there was no longer any joint interest. But this view is fully met by the case of *Blodget v. Morris*, *supra*. There, *Johnson, J.*, says: "It was well settled, before the code, that in actions *ex contractu*, a plea by one defendant to the action enured to the benefit of all the defendants who did not plead; and if one of several defendants succeeded upon a plea going to the merits of the action, the plaintiff was precluded from obtaining any benefit from a judgment by default, suffered by other defendants. This, I apprehend, is still the law," &c. *Vide*, also, *Kincaid et al. v. Purcell*, 1 Ind. 324. This, we have no doubt, is the correct doctrine; and applied to this case, it shows that the witness was correctly excluded, because so far as *Sutherlin* should succeed, the witness offered must succeed. In other words, if *Sutherlin* succeeded in his defense, no damages could be assessed against *Maxwell*, on

Nov. Term, 1861. his default. The answers of *Sutherlin*, we have seen, were usury and want of consideration. If he succeeded on either of these, it would defeat the note, not only as against himself, but also as against *Maxwell*. Although *Maxwell* made default, yet the entire record would show that there was no good cause of action against him. This is in accordance with the case of *King v. The State*, 15 Ind. 64.

BOARD OF
COMMISSIONERS,
&C.
v.
SHEETS.

Per Curiam.—The judgment is affirmed, with 5 per cent. damages and costs.

R. Crawford, for the appellants.

W. T. Otto and *John Baker*, for the appellee.

THE BOARD OF COMMISSIONERS OF WABASH COUNTY v. SHEETS.

Suit by *S.*, recorder of *Wabash* county, to recover for services in keeping up a general and double index of deeds, and another of mortgages, and indexing therein a certain number of deeds and mortgages, at fifteen cents per hundred words.

Held, that § 3, of the act of *February 14, 1855*, (Acts 1855, p. 158,) must be construed to mean that the indexing of deeds and mortgages shall be considered a part of the service of recording them, and that the fee for recording shall be deemed to include the indexing.

Held, also, that the recording and indexing being one service, and included in one fee, it can not be said that the recorder is required to keep up the index without compensation; and hence, he can not recover for the indexing, under the act of *March 2, 1855*, (Acts 1855, p. 106,) as for services not provided for by law.

Monday,
November 25.

APPEAL from the *Wabash* Circuit Court.

DAVISON, J.—*Sheets*, who was recorder of *Wabash* county, on *September 1, 1859*, presented to the *Board of Commissioners* of said county, a claim for services as recorder, from *November 1, 1855*, to *June 1, 1859*, and demanded its allowance and payment. The claim is as follows:

"THE BOARD OF COMMISSIONERS OF WABASH COUNTY,
To LEWIS SHEETS, Dr.,

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BOARD OF
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"To keeping up general and double index, and indexing therein 2,589 deeds, at eighty words to each deed, making 207,120 words, at fifteen cents for each one hundred words, - - - - - \$310.00

"To keeping up general index, the same being double, and indexing therein 801 mortgages, at eighty words each, making 64,080 words, at fifteen cents for each one hundred words, - - - - - 96.12

"To indexing miscellaneous matters, required by law to be recorded and indexed, making 800 words, at fifteen cents for each one hundred words, - - 1.20

"To keeping up entry book, and entering therein the time when deeds, mortgages, bonds, &c., were received for record, number of words being 10,000 at fifteen cents for each one hundred words, - - 15.00"

Upon the filing of this claim, the *Board of Commissioners* made an order whereby they refused to allow it, and *Sheets* appealed. In the Circuit Court, to which the cause was taken by appeal, the defendants demurred separately to each paragraph of the claim; but their demurrers were overruled, and final judgment rendered for the plaintiff. It is conceded, that the solution of one question decides this case, viz., does the law authorize the recorder to charge the county for these services?

The first and second sections of "An Act, approved *February* 14, 1855, require the recorders of each county to make out, where the same has not been done, a complete general and double index to all records of deeds, &c., for real estate, in his office. And for the making thereof, the board of commissioners is directed to allow fifteen cents for each one hundred words therein contained. The third section enacts, that "After the completion of such indexes, it shall be the duty of such recorder to keep up such index, in the manner aforesaid, as deeds and mortgages shall from time to time be recorded, without any compensation beyond, or

Nov. Term, 1861. apart from, the fees allowed by law for recording such deeds and mortgages." Acts 1855, pp. 157, 158.

BOARD OF
COMMISSION-
ERS, &C.
V.
SHREVE.

Section three, just recited, is very explicit. In express terms, it disallows the charges in the complaint. But we are referred to the act relating to fees, &c., approved *March 2*, 1855, which provides, § 7, that the "Fees of county recorders shall be as follows: for recording deeds and mortgages, and the acknowledgment thereof, one dollar. For recording all other instruments, and giving certified copies of any record, for each one hundred words, ten cents." And, "For all services not specifically provided for in this act, the recorder shall be allowed the same fees allowed by law for similar services." And further, it is provided, § 35, that "The act regulating the fees of officers," approved *June 16*, 1852, "and all former laws in conflict with this act, or any part of it, be, and the same are hereby repealed." Acts 1855, pp. 106, 115.

The appellee argues "that the act of *March 2*, repeals all former laws in conflict with it; that § 3 of the act of *February 14*, is in conflict with that of *March 2*, in this, that it provides that a specific service shall be rendered without compensation, and that under that clause of the act of *March 2*, which says: 'For all services, not specifically provided for in this act, the recorder shall be allowed the same fees as are allowed by law for similar services,' the plaintiff was entitled to recover the claim charged in the complaint."

Are these enactments so in conflict that they can not, by interpretation, be made to stand together? If they are not, then the act of *March*, though it is the last expressed will of the Legislature, should not be held to operate as a repeal of the former act. As has been seen, the third section of the act of *February*, declares that the indexing, &c., shall be kept up "without any compensation beyond, or apart from, the fees allowed for recording," &c. Now, it seems to us, that that section, properly construed, intends that the indexing of deeds and mortgages shall be considered a part of the service of recording them, and that the fee for recording shall be deemed to include the indexing. This construction being correct, and we think it is, the act of *March*

is not in conflict with § 3, above recited. That act, in our judgment, should be construed with the prior enactment, which points out what the fee for recording shall include. And this being done, the two enactments are plainly consistent; the latter fixes the fee for recording, and in doing so, in effect, though not in terms, fixes the fee for both making the record and keeping up the index. The recording and indexing being thus one service, and included in the same fee, it can not be said that the recorder is required to keep up the indexes without compensation. And being thus allowed for the services in question, he is not entitled, in this case, to recover as for services not provided for by law.

Per Curiam.—The judgment is reversed, with costs. Cause remanded, &c.

D. D. Pratt, for the appellant.

O. Blaine and *W. Z. Stuart*, for the appellee.

(1) A petition for a re-hearing was filed in this case, *January 20, 1862*. The point presented in the petition was, "whether § 3, of the act of *February, 1855*, (Acts 1855, p. 158,) is not unconstitutional and void, because it is not embraced in the title of the act." The petition was overruled, *February 4, 1862*.

STORY v. HILL.

APPEAL from the *Allen* Common Pleas.

Per Curiam.—*Hill*, who was the plaintiff, sued *Story* upon a promissory note for the payment of \$275, alleging in his complaint that the note was executed by the defendant, payable to himself, and by him indorsed to the plaintiff. Defendant answered by a general denial. Trial by the Court, and finding for the plaintiff. Defendant moved for a new trial, assigning for cause, that "The finding was contrary to law, and unsustained by the evidence;" but his motion was denied, and he excepted. Judgment for the plaintiff. The record does not profess to set out the evidence given on the

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STORY
v.
HILL.

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Nov. Term, 1861. trial, hence, the alleged causes for a new trial are not available in this Court. And there being no bill of exceptions, or exception in any form, other than that to the ruling upon the motion for a new trial, there is nothing before us for consideration.

THE STATE
v.
ATKISSON.

The judgment is affirmed, with 5 per cent. damages and costs.

M. Jenkinson, for the appellant.

Isaac Jenkinson, for the appellee.

THE STATE, on the relation of the Board of Commissioners
of WASHINGTON COUNTY v. ATKISSON and Others.

Suit against a recorder and the sureties, on his official bond. The breaches alleged were, *first*, that he failed to index twenty thousand deeds, that were in his office at the time he assumed the duties thereof; and, *second*, that he failed to keep up and continue the index to ten thousand deeds, that were recorded by him during his continuance in office.

Held, that as to the first breach alleged, only nominal damages, if any, could be recovered, as the recorder would have been entitled to extra compensation for indexing deeds recorded before his time.

Held, also, that as to the second breach, the county board was authorized to employ his successor to index the deeds recorded during the defendant's term; and as he would not have been entitled to any extra allowance for keeping up such index, the board can recover, in an action on his bond, such reasonable sum as they may have paid to index the deeds recorded during his term.

Monday,
November 25.

APPEAL from the *Washington* Circuit Court.

HANNA, J.—*Alexander Atkisson* was the recorder of said county, from *August* 19, 1853, until, and for the term of, four years. The other defendants were his securities or a bond for the "faithful and honest discharge of all the duties of his office." This is a suit upon the said bond; and, for breach, it is alleged, *first*, that he failed to index twenty thousand deeds, &c., that were in his office at the time he assumed the

duties thereof; and, *second*, that he failed to keep up and continue the index to ten thousand deeds, &c., that came into said office, and were recorded, during his term.

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THE STATE
V.
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A demurrer to the complaint, on the ground that the facts stated were not sufficient, and for the want of proper parties, was sustained. This ruling presents the only question in the case.

Under the statutes (1 R. S., p. 427; Acts 1855, p. 158,) if he had made necessary indexes to records in his office, of deeds, &c., recorded before he came into office, he would have been entitled to compensation therefor. *Board of Com's, &c. v. Kromer*, 8 Ind. 446. But he would not have been entitled to any thing, other than the regular fee for recording, for keeping up said index, by entering therein deeds, &c., recorded during his term. *Turpen v. Board of Com's, &c.*, 7 Ind. 172; *Board of Com's, &c. v. Sheets*, ante, p. 22.

So far as the pleadings show, we can not perceive that for failing to index the deeds recorded before he came in, any more than nominal damages could have been recovered, if that. The board have, they allege, paid his successor for work which, if he had performed it, they would in like manner have been called upon to have paid him for. As to the other breach, the board avers that *Morrison*, the successor of said *Atkisson*, made the index of deeds, &c., recorded by said *Atkisson*, for which they were compelled to pay, and did pay, said *Morrison*.

Did these facts constitute a breach of the bond, and if so, was it to the damage of the relator?

We have no doubt that the failure of the recorder to perform the duty thus enjoined upon him, was a breach of his official bond; but whether a right of action, for such general failure, resulted to the relators, is a more difficult question. It is insisted that the bond secures to each individual a right of action for any injury which he might suffer from such neglect of duty; but that as to the public, the remedy for such breach of duty is not on the bond, but by a criminal prosecution. And further, that it was not the duty of, nor was it obligatory upon, the county board, to pay for continuing and keeping up the index.

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HOLCROFT
v.
SHERLEY.

Perhaps the question turns upon this latter proposition; for if the relators were authorized to pay the successor of *Atkisson*, for the work which he failed to perform, then it would appear to follow that they could maintain the suit. We are of opinion that they were authorized to make such payment. It may be that it was discretionary with them whether they would do so or not. As to that we need not decide. They aver the payment. It was the duty of the officer who recorded the deeds, &c., to make the index thereof, without additional compensation, either from the individual or the county; if he failed in that duty, the board could, for the public interest and convenience, see that it was performed by another, and pay that other a reasonable compensation for the work. This, in our opinion, would give a right of action on the bond of the officer, who was thus derelict in duty, to the injury of the public. The demurrer should have been overruled.

Per Curiam.—The judgment is reversed, with costs. Cause remanded, &c.

R. Crarford, for the appellant.

C. L. Dunham, for the appellee.

HOLCROFT and Others v. SHERLEY and Others.

Monday,
November 25.

APPEAL from the *Crarford* Common Pleas.

Per Curiam.—The judgment in this case must be reversed, with costs, and the cause remanded for a new trial; and it is so done, on the authority of *Holcroft v. Ha'bert*, 16 Ind. 256.

Henry Crarford, for the appellants.

W. A. Porter, for the appellees.

SCHNELL v. NELL.

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v.
NELL.

A.'s wife died testate, and by her will bequeathed to *B.*, *C.*, and *D.*, each, the sum of \$200, but left no property out of which the legacies, or any part of them, could be satisfied. After her decease, *A.* entered into an agreement, in writing, with the legatees, by which he agreed to pay to them the several sums bequeathed to them by his wife, in consideration, 1. of one cent; 2. of the love and affection he bore his deceased wife, and the fact that she had done her part in the acquisition of his property; and 3. that she had expressed her desire by her will, that they should have said sums of money. Suit upon the agreement. Answer: want of consideration.

Held, that the doctrine that inadequacy of consideration will not vitiate an agreement, does not apply to a mere exchange of sums of money, the values of which are exactly fixed; but to the exchange of something of indefinite value, for money, or for some other thing of indefinite value.

Held, also, that a consideration of one cent will not support a promise to pay six hundred dollars; but such a contract is so unconscionable as to be void, on its face.

Held, also, that the wife's will imposed no obligation on *A.* to pay the legacies out of his property; and as his wife had none of her own, out of which they might be paid, his promise to pay them was not legally binding upon him.

Held, also, that where a claim is legally groundless, a promise made upon a compromise of it, or of a suit upon it, is not binding.

Held, also, that the love *A.* bore his wife, and her services in the acquisition of his property, were not good considerations to support his promise to pay the legacies, *first*, because they were past considerations; and, *second*, because they constituted no consideration for a promise to pay money to a third person.

APPEAL from the *Marion* Common Pleas.

Monday,
November 25.

PERKINS, J.—Action by *J. B. Nell* against *Zacharias Schnell*, upon the following instrument:

"This agreement, entered into this 13th day of *February*, 1856, between *Zach. Schnell*, of *Indianapolis*, *Marion* county, State of *Indiana*, as party of the first part, and *J. B. Nell*, of the same place, *Wendelin Lorenz*, of *Stilesville*, *Hendricks* county, State of *Indiana*, and *Donata Lorenz*, of *Frickinger*, *Grand Duchy of Baden*, *Germany*, as parties of the second part, witnesseth: The said *Zacharias Schnell* agrees as follows: whereas his wife, *Theresa Schnell*, now

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deceased, has made a last will and testament, in which, among other provisions, it was ordained that every one of the above named second parties, should receive the sum of \$200; and whereas the said provisions of the will must remain a nullity, for the reason that no property, real or personal, was in the possession of the said *Theresa Schnell*, deceased, in her own name, at the time of her death, and all property held by *Zacharias* and *Theresa Schnell* jointly, therefore reverts to her husband; and whereas the said *Theresa Schnell* has also been a dutiful and loving wife to the said *Zach. Schnell*, and has materially aided him in the acquisition of all property, real and personal, now possessed by him; for, and in consideration of all this, and the love and respect he bears to his wife; and, furthermore, in consideration of one cent, received by him of the second parties, he, the said *Zach. Schnell*, agrees to pay the above named sums of money to the parties of the second part, to wit: \$200 to the said *J. B. Nell*; \$200 to the said *Wendelin Lorenz*; and \$200 to the said *Donata Lorenz*, in the following installments, viz., \$200 in one year from the date of these presents; \$200 in two years, and \$200 in three years; to be divided between the parties in equal portions of \$66 $\frac{2}{3}$ each year, or as they may agree, till each one has received his full sum of \$200.

"And the said parties of the second part, for, and in consideration of this, agree to pay the above named sum of money [one cent], and to deliver up to said *Schnell*, and abstain from collecting any real or supposed claims upon him or his estate, arising from the said last will and testament of the said *Theresa Schnell*, deceased.

"In witness whereof, the said parties have, on this 13th day of *February*, 1856, set hereunto their hands and seals.

"ZACHARIAS SCHNELL, [SEAL.]

"J. B. NELL, [SEAL.]

"WEN. LORENZ." [SEAL.]

The complaint contained no averment of a consideration for the instrument, outside of those expressed in it; and did

not aver that the one cent agreed to be paid, had been paid or tendered. Nov. Term,
1861.

A demurrer to the complaint was overruled.

The defendant answered, that the instrument sued on was given for no consideration whatever.

He further answered, that it was given for no consideration, because his said wife, *Theresa*, at the time she made the will mentioned, and at the time of her death, owned, neither separately, nor jointly with her husband, or any one else (except so far as the law gave her an interest in her husband's property), any property, real or personal, &c.

The will is copied into the record, but need not be into this opinion.

The Court sustained a demurrer to these answers, evidently on the ground that they were regarded as contradicting the instrument sued on, which particularly set out the considerations upon which it was executed. But the instrument is latently ambiguous on this point. See Ind. Dig., p. 110.

The case turned below, and must turn here, upon the question whether the instrument sued on does express a consideration sufficient to give it legal obligation, as against *Zacharias Schnell*. It specifies three distinct considerations for his promise to pay \$600:

1. A promise, on the part of the plaintiffs, to pay him one cent.

2. The love and affection he bore his deceased wife, and the fact that she had done her part, as his wife, in the acquisition of property.

3. The fact that she had expressed her desire, in the form of an inoperative will, that the persons named therein should have the sums of money specified.

The consideration of one cent will not support the promise of *Schnell*. It is true, that as a general proposition, inadequacy of consideration will not vitiate an agreement. *Baker v. R. ber's*, 14 Ind. 552. But this doctrine does not apply to a mere exchange of sums of money, of coin, whose value is exactly fixed, but to the exchange of something of, in itself, indeterminate value, for money, or, perhaps, for some other thing of indeterminate value. In this case, had the

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Nov. Term, 1861. one cent mentioned, been some particular one cent, a family piece, or ancient, remarkable coin, possessing an indeterminate value, extrinsic from its simple money value, a different view might be taken. As it is; the mere promise to pay six hundred dollars for one cent, even had the portion of that cent due from the plaintiff been tendered, is an unconscionable contract, void, at first blush, upon its face, if it be regarded as an earnest one. *Hardsey v. Smith*, 3 Ind. 39. The consideration of one cent is, plainly, in this case, merely nominal, and intended to be so. As the will and testament of *Schnell's* wife imposed no legal obligation upon him to discharge her bequests out of his property, and as she had none of her own, his promise to discharge them was not legally binding upon him, on that ground. A moral consideration, only, will not support a promise. Ind. Dig., p. 13. And for the same reason, a valid consideration for his promise can not be found in the fact of a compromise of a disputed claim; for where such claim is legally groundless, a promise upon a compromise of it, or of a suit upon it, is not legally binding. *Spahr v. Hollingshead*, 8 Blackf. 415. There was no mistake of law or fact in this case, as the agreement admits the will inoperative and void. The promise was simply one to make a gift. The past services of his wife, and the love and affection he had borne her, are objectionable as legal considerations for *Schnell's* promise, on two grounds: 1. They are past considerations. Ind. Dig., p. 13. 2. The fact that *Schnell* loved his wife, and that she had been industrious, constituted no consideration for his promise to pay *J. B. Nell*, and the *Lorenzen*, a sum of money. Whether, if his wife, in her lifetime, had made a bargain with *Schnell*, that, in consideration of his promising to pay, after her death, to the persons named, a sum of money, she would be industrious, and worthy of his affection, such a promise would have been valid and consistent with public policy, we need not decide. Nor is the fact that *Schnell* now venerates the memory of his deceased wife, a legal consideration for a promise to pay any third person money.

The instrument sued on, interpreted in the light of the

facts alleged in the second paragraph of the answer, will not support an action. The demurrer to the answer should have been overruled. See *Sevenson v. Druley*, 4 Ind. 519. Nov. Term, 1861.

Per Curiam.—The judgment is reversed, with costs. Cause remanded &c.

LASELLE
v.
WELLS.

James Morrison and *C. A. Ray*, for the appellant.

N. B. Taylor and *A. Seidensticker*, for the appellee.

LASELLE v. WELLS.

A rule of Court requiring a party desiring written instructions, only, to be given to the jury, to notify the Court of such desire before the trial commences, is repugnant to the laws of this State.

Where the Court has had timely notice of the desire of one of the parties that written instructions, only, shall be given to the jury, it is error for the Court to accompany such written instructions with verbal explanations, and illustrate them by reading from books; and such error was not, in this case, cured by a direction from the Court to the jury, to consider the verbal explanations and illustrations withdrawn.

APPEAL from the *Allen* Circuit Court.

Monday,
November 25.

HANNA, J.—Suit commenced before a justice, on a note. On appeal to the Circuit Court, trial, and judgment for the plaintiff. The defense was, that the note was given for an animal, for a certain purpose; that it was warranted fit for that purpose. That said property was so far valueless for the purpose named, that the warranty was broken, and the transaction a fraud upon the purchaser, who offered to return the property, &c.

The trial occupied five days. On the second day, the defendant notified the Court that he desired the instructions to the jury, to be in writing. The Court gave written instructions, but in reading them to the jury, explained the same by oral statements, and by reading from law books; to which the defendant objected, &c. The Court then said to the jury, that they should consider such verbal explanations

Nov. Term, as withdrawn. A rule of Court is shown by the record, as 1861. follows:

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"A party desiring written instructions to the jury, must notify the Court of such desire before the trial commences, or his right to the same will be considered as waived."

It is insisted that this rule is in conflict with the decisions of this Court, and is consequently repugnant to the laws of the State. In the act providing for an organization of Circuit Courts, 2 R. S., § 14, p. 7, the power is conferred upon said Courts to "adopt rules for conducting the business therein, not repugnant to the laws of this State." There is no statute fixing the time, in express words, at which, during the progress of a trial, the party desiring written instructions shall so inform the Court. We have a statute prescribing the manner of conducting a trial in a civil case, a fair construction of which fixes the time at which special instructions asked by a party, as contradistinguished from the general instructions given by the Court on its own motion, shall be presented for the consideration of the judge, namely, after the evidence has been heard, and before the argument has commenced. This has been referred to in support of the position that a request to give only written charges, made after the judge had commenced instructing the jury, came too late. 2 R. S., p. 110; *McJunkins v. The State*, 10 Ind. 140; *Newton v. Newton*, 12 *id.* 527. In the former case, in the absence of a rule of Court on the subject, it is said by this Court, that "The better rule would appear to be, to require such instructions to be presented, or request made, in time to receive due consideration by the judge." In the latter case, it is said that "the statute must be so construed as to require the party who desires a written charge, to notify the Court, in a reasonable time before it may be called upon to charge the jury, of his desire that such charge be in writing." Our code allows great latitude of amendments. As an instance: the Court may, at any time, direct "any material allegation to be inserted, struck out or modified, to conform the pleadings to the facts proved, when the amendment does not substantially change the claim or defense." 2 R. S., § 99, p. 48. Under this liberal system of practice, we do not very

readily perceive the necessity, or utility, of a notice, in regard to instructions being given before the evidence has closed. Instructions are usually framed with reference to their application to the issues, as finally submitted, and the evidence heard. Such appears to have been the view of our law makers, as to special instructions asked by either party. We know of no reason why the same rule should not govern as to the general instructions of the Court. Certainly, general instructions can be framed about as readily as special ones, which have often exhausted the ingenuity of able attorneys, can be considered.

We are therefore of opinion, that the rule of the *Allen* Circuit Court, upon this subject, is thus repugnant to the law; and that in the case at bar, the Court was properly notified that it was the desire of one of the parties that the instructions should be in writing. The verbal explanations and illustrations in this case, by reading from books, was an error, which the Court, we think, could not, upon being reminded thereof, cure by the attempt to withdraw such illustrations and explanations from the jury. The instructions were voluminous—unnecessarily so, and, so far as we are informed by the record, the explanations, &c., were of such a character as to not be readily separated from the written charges made to the jury, and consequently the attempt to withdraw the same was well calculated to confuse and mislead the jury, as to what was really before them.

The conclusion thus arrived at, renders it unnecessary to look to some other questions attempted to be presented.

Per Curiam.—The judgment is reversed, with costs. Cause remanded, &c.

I. M. Nind; and *H. W. Puckett*, for the appellant.

Crane & Smith, for the appellee.

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v.

LAVAL and Another v. ROWLEY.

ROWLEY. If a judgment be satisfied, the power to sell under it ceases; and should a sale take place in virtue of an execution upon such satisfied judgment, even a *bona fide* purchaser without notice would acquire no title.

Where a judgment is joint against two defendants, both are regarded as principals, unless by proof, *aliunde*, one of them is shown to be surety for the other; and when one of such defendants, claiming to be surety for the other, pays off the judgment, without any judicial determination of the question of his suretyship, he can not have execution for his use on the judgment.

17	38
130	212
17	36
138	109
17	36
132	660
132	563

Tuesday,
November 26.

APPEAL from the *Vanderburg* Circuit Court.

DAVISON, J.—*Rowley* brought this action against *Laval* and *Mann*, alleging, in his complaint, these facts: On *September* 6, 1855, *John F. Stacer* recovered a judgment, in the *Vanderburg* Common Pleas, against one *Peter Kuhlman*, and the plaintiff, *Nathan Rowley*, for \$181, in an action founded upon a note given by *Kuhlman*, as principal, and *Rowley*, as surety, and dated *July* 27, 1854. On *August* 8, 1857, *Rowley* paid the judgment, interest thereon, and costs. While *Rowley* was such surety, on said note, viz., on *March* 2, 1855, *Kuhlman* and his wife, with intent to hinder, delay and defraud his creditors, conveyed, by deed in fee simple, a part of lot 109, in the original plat of *Evansville*, (describing it,) to *Sarah Mann*, who received and accepted the conveyance for the same fraudulent purpose. And she, *Sarah*, on *August* 24, in the last named year, conveyed the same real estate to *John Laval*, who, at the time he accepted the conveyance, had full notice of the fraudulent purpose with which the premises had been conveyed to *Sarah Mann*. On *July* 9, 1857, an execution, for the use of *Nathan Rowley*, was issued on said judgment, by virtue of which the sheriff levied upon the above described real estate, and duly exposed the same to sale as the property of *Peter Kuhlman*. At this sale, *Nathan Rowley* became the purchaser, and, in pursuance of his purchase, received a sheriff's deed for the premises, dated *August* 8, 1857. The relief prayed is, that

the several conveyances to *Sarah Mann*, and *John Laval*, be decreed null and void, and that the title of *Nathan Rowley*, to the premises, be quieted, and for general relief, &c.

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ROWLEY.

The defendant, *Laval*, answered: 1. By a general traverse. 2. That he purchased the premises described, &c., in good faith, and for a valuable consideration; that at the time of the purchase, he paid *Sarah Mann* \$945, as part of the purchase money, and for the residue gave two notes, each for \$472, the first payable at one year from the date of the sale, and the second at two years; that when said money was paid, and notes given, she executed to him a deed, in fee simple, for the property, which was on that day duly recorded, &c. And the defendant avers that, at the time of the execution of the deed, he had no notice or knowledge of any of the matters, with the notice of which he is charged in the complaint; that in pursuance of the purchase, the defendant immediately thereafter took possession of the premises, and made lasting and valuable improvements thereon, worth \$4,000; that while these improvements were being made, *Rowley* stood by, and saw them in progress, without intimating to defendant that he had a claim against *Kuhlman*, or against the property. That *Rowley*, after the making of the improvements, caused the premises to be sold by the sheriff, as the property of *Kuhlman*, for \$200, upon an execution issued on said judgment, which sum, at the time of the sale was less than the thirtieth part of the cash value of the premises; and that the rents and profits thereof, for one year, were worth more than the amount of the judgment, interest thereon, and costs. Wherefore, defendant says that he is a *bona fide* purchaser without notice, and, as such, ought to be protected, &c.

A demurrer to this defense was sustained, and the defendant excepted. *Sarah Mann*, the other defendant, answered by a general denial. The issues were submitted to a jury, who, in answer to certain questions propounded to them, at the instance of the defendant, found specially as follows: 1. *Rowley* paid the judgment before the execution issued. 2. Prior to the time the execution was issued, no judicial proceedings

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ROWLEY.

were had to determine whether *Rowley* was, or was not, surety for *Kuhlman*. 3. No order of the Court was made awarding execution for *Rowley's* benefit, or declaring him to be defendant's surety in the judgment. 4. The deed from *Peter Kuhlman* to *Sarah Mann*, was made by him, and accepted by her, with intent to hinder and delay the creditors of *Kuhlman*. 5. *Laval*, before he purchased, had notice of the fraudulent character of the deed from *Kuhlman* to *Mann*. The jury also found a general verdict for the plaintiff. At the proper time, the defendants moved that judgment be given in their favor, upon the special finding of the jury; but the Court denied their motion, and they excepted. They then moved for a new trial, and in arrest, which motions were overruled. And thereupon, they moved for a new trial, under § 601 of the Practice Act; but this motion was also overruled, and they excepted. Final judgment was given for the plaintiff.

For a reversal, the defendants rely upon three grounds: 1. The execution, upon which the plaintiff bases his title, was void. 2. The action of the Court in sustaining the demurrer to the second defense. 3. The refusal to grant a new trial, under § 601 of the Practice Act.

As has been seen, the judgment under which the plaintiff claims title, was a joint recovery against himself and *Kuhlman*. There is nothing in the record of the proceedings in which it was rendered, tending to show that he was surety for *Kuhlman*; but the evidence in this case proves the fact, that he really was a mere surety in the judgment, and that, having paid it, he caused the execution thereon to be issued for his own use.

The general rule is, if a judgment be satisfied, the power to sell under it ceases; and should a sale take place in virtue of an execution upon such satisfied judgment, even a *bona fide* purchaser, without notice, would acquire no title 2 Hill, 566; 5 Barbour's S. C. Rep. 565; 18 Johns. 441. In this case, however, the plaintiff when he purchased, having himself paid the judgment, had, of course, notice that it was satisfied, and is not entitled to the relief sought, unless such payment gave him the right, as surety, to order the execution.

Evidently, the rules of the common law allowed no such right. Does it exist by statute? Nov. Term;
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Both parties rely upon an act which relates to "Remedies of sureties against their principals," and which contains these provisions:

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"SEC. 674. When any action is brought against two or more defendants upon a contract, any one or more of the defendants being surety for the others, the surety may, upon a written complaint to the Court, cause the question of suretyship to be tried and determined, upon the issue made by the parties, at the trial of the cause, or at any time before or after the trial, or at a subsequent term; but such proceedings shall not affect the proceedings of the plaintiff.

"SEC. 675. If the finding upon such issue be in favor of the surety, the Court shall make an order directing the sheriff to levy the execution first upon, and exhaust, the property of the principal, before a levy shall be made upon the property of the surety, &c.

"SEC. 676. When any defendant, surety in a judgment, or special bail, or replevin bail . . . has been or shall be compelled to pay any judgment, or any part thereof, or shall make any payment which is applied on such judgment, by reason of such suretyship . . . the judgment shall not be discharged by such payment, but shall remain in force for the use of the bail, surety, or other person making such payment, and after the plaintiff is paid, so much of the judgment as remains unsatisfied may be prosecuted to execution for his use.

"SEC. 677. Any one of several judgment defendants, and any one of several replevin bail, having paid and satisfied the plaintiff, shall have the remedy provided in the last section against the co-defendants, or co-sureties, to collect of them the rateable proportion each is equitably bound to pay." 2 R. S. pp., 186, 187.

These sections, it must be conceded, very distinctly point out the remedy of a defendant, surety in a judgment. Having paid it, the judgment remains in force for his use, and for his benefit it may be "prosecuted to execution." But it is argued that the remedy thus prescribed can not be made

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available, until the question of suretyship has been "tried and determined," in a judicial proceeding. This may not be required in the case of replevin or special bail, because the contract of such bail, on its face, always shows that the party is bound, alone, in the character of a surety. But where the judgment is joint, against two defendants, both are regarded as principals, unless, by proof *aliunde*, one of them is shown to be a surety. And this leads to the inquiry whether, under the enactments to which we have referred, a party defendant to such joint judgment can assert the rights of a surety, until he is declared such, by the order of a competent court? Section 676, which declares the judgment in force for the use of the surety who pays it, provides no mode in which the question of suretyship may be determined. But § 674 says, that any defendant, being a surety, may, upon written complaint, "cause that question" to be tried, "upon the issue made by the parties at the trial of the cause, or at any time before or after the trial, or at a subsequent term." It is, however, insisted that that section, as also the one that immediately succeeds it, applies solely to the execution issued for the use of the judgment plaintiff; "the object being to compel him to resort, first, to the property of the principal, and save the surety from the inconvenience of first paying the plaintiff, and then collecting the money from the principal." This is, doubtless, one prominent object of these sections, but we perceive no reason why they may not, also, intend to enable the surety to place himself in a position to enforce his rights, under other sections of the statute. Indeed, it is not easy to see how a judgment defendant can be recognized as a defendant surety, entitled to an execution, under § 676, until he has been adjudged to be such, in the manner prescribed in § 674. Unless the record shows him to be a defendant surety, the clerk is not, upon his demand, authorized to issue an execution; because, in the absence of record evidence of that fact, he must be deemed a principal in the judgment. And the result is, the plaintiff in this case having satisfied the judgment, without any judicial determination of his suretyship, the execution under which the premises were sold must be held a nullity.

As this conclusion defeats the plaintiff's action in the Court below, other points made in argument will not be noticed.

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1861.

Per Curiam.—The judgment is reversed, with costs. Cause remanded, &c.

LUCAS
v.
TUCKER.

Conrad Baker and *J. W. Foster*, for the appellants.

J. G. Jones, *James E. B'ythe*, and *M. S. Johnson*, for the appellee.

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17	41
146	134
17	41
148	688
17	41
168	591

The laws of the State in which lands are situated, must control in acquiring and transferring the title thereto.

In order to the transfer of lands by a devise, the will must, in its execution, proof, &c., conform to the law of the place where the land is situated; unless a different mode is recognized by the local law.

An executor derives his power to act as such, in reference to the transfer of immovable property, from a compliance with the law of the place where he attempts to operate under the will, and not from the will alone.

Where local laws exist, in regard to executors appointed in another State, the same must be at least substantially complied with, before the executor can there be recognized as such.

The curative statutes enacted by our Legislature to heal certain defects in sales made by executors, only embrace the proceedings of such persons as have acted, or attempted to act, under the laws of this State, either by original appointment under the same, or by conforming thereto, if appointed without the State. And, hence, can have no application to a case where executors, appointed and qualified in another State, proceed to sell lands in this State, under a power contained in the will, without attempting to conform to the laws of this State on the subject of foreign wills.

APPEAL from the *Laporte* Circuit Court.

Tuesday,
November 26.

HANNA, J.—On *January 1, 1843*, *Francis Lucas*, a resident of *Ohio*, died there testate, the owner of lands in *Indiana*. In *May, 1843*, his will was admitted to probate in the county where he died, and the executors therein named, *Stokes* and *Crane*, gave bond, &c., and letters were issued to them. On *October 2, 1843*, they caused a copy of the will

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After certain bequests, &c., the will contains this clause: "14th. My will is that my executors shall, and they are hereby empowered to, sell lands in the State of *Indiana* of mine, or so much as is required to pay my debts, and legacies contained in this my last will and testament; and if all my lands in said State be insufficient to pay my debts, as aforesaid, then my will is, to sell lands of mine in *Warren* county, *Ohio*, to make up the balance of money to pay debts as above."

On *June* 9, 1845, said *Stokes* and *Crane* sold, at public auction, and conveyed to *Tucker*, the lands in controversy, which have been ever since occupied by him. Other lands, it appears, to the amount of 3,500 acres, were also sold.

The will was, perhaps, executed and proved according to the laws then in force in *Ohio*; this appears to be conceded.

The statute referred to, as authorizing the placing said will, &c., upon record in the recorder's office, is the statute of frauds and perjuries, (R. S. 1838, pp. 314, 315) which provided, among other things, that a devise of lands should be in writing, signed, attested, &c., be proved, &c., and that "proved wills," &c., "devising real estate, or any interest therein, should be admitted to record in like manner as proved conveyances of real estate," &c.

Before the sale in question, the Revised Statutes of 1843 were in force, by which, (§ § 257, 258, 259, p. 533,) it was provided that lands sold under a power in a will should be under the direction of the Court, in like manner as sales for the payment of debts, and subject to appraisement, as if sold on execution. Acts 1843, p. 51.

No order of Court in reference to the sale of said lands was made, nor were they appraised.

The reason for causing the will to be recorded in the recorder's office, we suppose, was that the clause quoted was by the executors construed to be a bequest of lands, or the creation of a trust or interest therein, instead of a mere power to sell. We do not deem it necessary to decide whether this case fell within the statute authorizing such act of recording, for

even if it did, we are not able to perceive any benefit arising from that act alone; indeed, if we understand the brief of appellee, it is therein admitted that the proceedings of the executors were irregular, and the sale erroneous; but it is insisted that such irregularities and errors are cured, and the sale rendered valid, by certain statutes since enacted.

On *January* 28, 1847, a statute was approved to "amend the practice in the Probate Court," by which, among other things, it was enacted "that all the sales heretofore made by executors, in strict conformity with the provisions of any will, be, and the same are hereby, confirmed and made valid." Acts 1847, p. 117.

On *February* 16, 1848, another statute was approved, entitled "An Act to amend the ninth article of chapter 30, of the Revised Laws of 1843," in which, by § 1, it was enacted that a sale by an executor, under a power in a will, was authorized without a resort to a Court; and, § 2, "That all sales heretofore made by executors, or administrators with the will annexed, made in accordance with the power given in any will, are hereby confirmed." Acts 1848, p. 10.

Chapter 30, referred to, contains, among other matters, minute provisions as to the production and authentication of, and manner of proceeding upon, foreign wills, or those made and proved in another State. The substance of these enactments is, that if such will is proved and certified in the manner therein designated, and if upon its production to the Probate Court of a county in which there is any estate "upon which said will may operate, said Court shall be satisfied that the instrument ought to be allowed," &c., the same shall be filed and recorded by the clerk, and shall have the same force and effect as if it had been originally admitted to probate in this State; that letters shall then be issued thereon, and further proceedings had, as in cases originally arising in this State; but that the same shall not be construed as making valid any will, &c., that is not executed, attested and subscribed, in the manner prescribed by the laws of this State, (R. S. 1843, §§ 47, 48, 49, 50, 51, p. 495,) and that the Courts of this State shall have the same jurisdiction, as to filling vacancies, requiring

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v.
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Nov. Term, 1861. sureties, &c., as to wills in this State. § 444. And said executors shall be subject to the same liabilities, actions and provisions of law &c. § 443, p. 569.

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These various acts are referred to, because upon them arises a question preliminary to the main one discussed, as to the power of the Legislature to cure such defects as those arising in this case. That question is, whether the vendors of this land are in a condition to avail themselves of the advantages, if any, of these curative statutes. In other words, could they in any sense be considered as executors, so far as their acts in this State were concerned, unless they had, at least substantially, complied with these statutes, by the production of the will to the proper Court, procuring an order of Court, causing it to be filed and recorded, and letters to issue thereon, and an order as to security, &c. R. S. 1843, §§ 266, 267, 268, p. 534. As they entirely failed to comply with these statutes in any respect, were not their acts those of individuals, and not performed in a fiduciary capacity? Did the Legislature, in these amendments of a curative nature, have reference to persons who had been professing and attempting to act under our laws; or did they have in view, as well, the proceedings of those who may have come from abroad and acted without regard to our laws?

In *Call v. Ewing*, 1 Blackf. 301, it was held by this Court, that a person appointed executor must conform to the statute requiring him to prove the will, give bond, and take out letters, before he could serve; and if he did not, he "could not be considered as an executor under our act of Assembly." Nor can he have a "right to the property, nor be liable to a suit for the debts, unless he accepts." See, also, 1 Blackf. 372.

In *Naylor v. Moody*, 2 Blackf. 247, it was held that letters testamentary granted in another State will not authorize a suit in this State, unless they are filed and recorded in the Circuit Court here, as required by the statute. R. S. 1824, p. 324. See, also, *Naylor v. Moody*, 3 Blackf. 92; *Fenwick v. Sears' Adm's*, 1 Cranch, 259; *Dixon's Executors v. Ramsay's Executors*, 3 *id.* 319. In the last cited case, it is held that an executor sues by virtue of his letters testamentary, and can

only sue in Courts to which the power of those letters extends. Nov. Term, 1861.

In *Kerr v. Moore*, 9 Wheaton, 565, it was held that, "It is an unquestionable principle of general law, that the title to, and the disposition of, real property, must be exclusively subject to the laws of the country where it is situated." See, also, Story's Conflict of Laws, §§ 424, 428, 435. And, that as to personal property, "A person claiming under a will proved in one State, can not intermeddle with, or sue for, the effects of a testator in another State, unless the will be proved in that other State, or, unless he be permitted to do so by some law of that State." And it is further held, in the same case, that where lands situated in *Ohio*, were claimed by virtue of a will made and proved in *Kentucky*, it was essential to the establishment of the title, to prove that the will had been proved and recorded according to the laws of *Ohio*. See, also, Jarman on Wills, vol. 1, p. 1, and note.

So in Toller on Executors, in his chapter treating of the Probate of the Will, it is said, in substance, that although an executor derives, from the will, his right to act, yet, until the probate thereof, Courts will not judicially notice him as such.

In *McCormick et al. v. Sullivan et al.*, 10 Wheaton, 192, it was held that "Title to lands, by devise, can be acquired only under a will duly proved and recorded, according to the law of the State in which the lands lie; and that the probate of a will in the State of *Pennsylvania* gave it no validity whatever in respect to lands situated in the State of *Ohio*, and as to which the Court considered the deceased as having died intestate, and, consequently, that they descended to his heirs."

In *Taylor v. Benham*, 5 How., the same court uses this language: "It is obvious, likewise, on principle, that where a sale is made under a will, which is merely the evidence of authority or power to do it, the omission to record it will not vitiate the sale, unless recording is, in such case, required by a local statute. If so required, the statute must, of course, govern. Probably, the necessity for this must depend entirely on the local laws applicable to the transaction—the *lex rei sitæ*."

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These decisions are cited, with reference to certain propositions, in support of which many other authorities might be adduced, namely:

1. That the laws of the State, in which lands are situated, must control in acquiring and transferring the title thereto.

2. That to transfer title to lands by a devise, the will must, in its execution, proof, &c., conform to the law of the place where the land is situate, unless a different mode is recognized by the local law.

3. That an executor derives his power to act as such, in reference to the transfer of immovable property, from a compliance with the law of the place where he attempts to operate under the will, and not from the will alone.

4. That where local laws exist, in regard to executors appointed, &c., in another State, the same must be, at least substantially, complied with, before the executor can there be recognized as such.

We think this fourth proposition is clearly inferable from the decisions quoted; and, indeed, in our own Court, it was long since so shadowed forth as to leave scarcely room for doubt on the subject.

Looking at these principles, in connection with another, to wit, that legislative action is supposed to be had with reference to settled principles of law, and especially where those questions have been adjudicated in the same jurisdiction, we can arrive at but one conclusion, and that is, that the curative statutes in question, were intended to, and do, embrace only the proceedings of such persons as have acted, or attempted to act, as executors, under the laws of this State, either by original appointment under the same, or by conforming thereto, if appointed without the State.

It follows, that the record before us does not show a case where these curative statutes could operate, and therefore the validity of the same need not be discussed; and that the rulings of the Court, on demurrers, were erroneous.

Per Curiam.—The judgment is reversed, with costs. Cause remanded, &c.

John B. Niles and *Henry T. Niles*, for the appellant.

James Bradley and *D. J. Woodward*, for the appellee

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A bill of exceptions purporting to set out the evidence, must contain the words, "this was all the evidence given in the cause." The words, "this was all the evidence given on said trial" are not sufficient.

When the evidence is not in the record, the instructions given by the Court below will be presumed to be correct, if in any supposable state of facts, they would rightly expound the law; and instructions refused will be presumed to have been refused because not applicable to the evidence.

APPEAL from the *Decatur* Circuit Court.Tuesday,
November 26.

Per Curiam.—Suit to subject land to execution, where the title was claimed to be fraudulently in a third person. Judgment for the plaintiff below. The evidence is not in the record. No bill of exceptions states that "this was all the evidence given in the cause," but simply contains these words, "this was all the evidence given on said trial." The following are the objections urged in this Court to the proceedings below.

1. That the Court erred in their instructions, as to the time when a certain deed was delivered.

2. That the Court erred in refusing certain instructions, as to the time when a certain deed had been delivered.

3. That the Court erred in refusing to hear proof that the grantor had said to the grantee, four months before the deed was made, that he would, or intended to, make it. The legal proposition upon which the party offered this evidence was, that the deed, when executed, related back to the time of that conversation, even as against *bona fide* liens and purchasers.

The foregoing are all the errors relied upon in argument, in this Court.

As the evidence is not of record, it is impossible for us to say whether the instruction, touching the time when a legal delivery of the deed in question in this case, was effected, was right or wrong, upon the evidence. Delivery depends so much upon intention, which may be inferred from acts and circumstances, that a definition, enumerating particulars, meeting and applicable to every case, can not be laid down. It is easy to conceive a state of facts in which the instruction

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would be right. We must presume in its favor. The deed in question, it seems, was executed by the grantor in one place, sent by mail to a person, other than the grantee, at another, and by him subsequently delivered to the grantee. The instructions refused, we must presume were not pertinent and applicable to the evidence. As to the evidence of the verbal promise above mentioned, to make the deed, the cases of *Hale v. Hills*, 8 Conn. 38; *Goodsell v. Stinson*, 7 Blackf. 437; and *Samson v. Thornton*, 5 Met. 275, seem to be decisive against it.

The judgment is affirmed, with costs.

Richard Robbins and *J. S. Scobey*, for the appellants.

James Gavin and *Oscar B. Hord*, for the appellee.

KING v. THE CITY OF MADISON.

The charter of the *City of Madison* (Local Laws, 1848, p. 89,) provides for the election of an assessor on the first *Monday in April*, and requires him forthwith, after his election, to make out the tax list of persons and property, and to complete the same by the first of *July* following, and that time shall not be allowed for that purpose beyond *September* first, following. The collector is, however, authorized, while engaged in collecting the taxes, to list persons and property which the assessor failed, or omitted, to list. The charter also authorizes a tax upon bank stocks.

Held, that under these provisions of the charter, persons, or property, becoming taxable after the first of *September*, as bank stock created after that time, could not be listed for taxation, since the assessor can not be said to have failed or omitted to list, that which did not then exist as a subject of taxation.

Held, also, that the provision of the city charter which authorizes a tax upon bank stocks, is controlled, as to the stock of the Bank of the State of *Indiana*, by the charter of that bank, which in express terms exempts such stock from taxation for municipal purposes; and this exemption relates to all legal modes of taxation.

*Tuesday,
November 26.*

APPEAL from the *Jefferson* Circuit Court.

PERKINS, J.—Suit to enjoin the collection of taxes. Injunction refused. No question is made as to jurisdiction.

For more than a year prior to *October 1, 1858*, *John King*, a citizen of the city of *Madison, Indiana*, had been the owner of eighty shares of the capital stock of the Branch of the Bank of the State located in that city.

On *October 1, 1858*, the Branch increased her capital stock, and *King* became the owner of forty shares of the new stock. The corporation of *Madison* assessed a city tax upon *King's* stock, which he owned prior to *October 1*, and the collector assessed a tax for the city upon the stock created on *October 1, 1858*, and was proceeding to collect both, when he was sought to be enjoined by this suit, in which, however, the Court refused an injunction.

Two questions are raised.

1. Can the *City of Madison* tax any of the capital stock of the Bank of the State of *Indiana*?

2. If so, could she tax that created *October 1, 1858*, for the year 1858?

We will answer the second question first.

By the charter of the *City of Madison*, the city assessor is elected on the first *Monday in April*; and it is made his duty to proceed, forthwith after his election, to make out the tax list of persons and property, and to complete the same by the first of *July* following, and he can not be allowed time beyond the first of the succeeding *September*. The collector, however, is authorized, when engaged in collecting the taxes, further to list persons and property which the assessor failed or omitted to list, but no others. Now, this implies that the persons and property to be listed by the collector, must have existed, as subjects of taxation, at the time the assessor was performing his duty, otherwise he could not be said to have failed or omitted to place them upon the list. It would seem, therefore, that the charter of *Madison* does not permit the listing of persons or property becoming taxable after the time for the assessor to discharge his duty has expired; and it would seem to be a defect in the charter, that it fails to fix a given day to which all taxation for a given year should be referred. The State law does this. Many cities practice upon this rule; and justice demands that all should, else double taxation may result. In this case, Mr.

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Nov. Term, *King* may have been listed by the assessor for money on
 1861. hand, or at interest, which, when the collector came round,
 had been converted into the bank stock that the collector
 sought again to list, thus imposing double taxation.

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Passing now to the consideration of the questions first asked above, we observe, at the outset, that the stock of the bank ought to be subject, as other property, to municipal taxation. No good reason can, we think, be assigned why a resident of a city, owning bank stock, should not pay taxes to the city on that stock, as well as the owners of other kinds of stocks on them. The bank stock is voluntarily chosen as an investment, is as profitable, and will bear taxation as well as any kind of property, and no bonus has been paid for exemption, while the government protects all alike. But the question we have to settle is, can it be taxed under the law? Has the law exempted it from taxation? for if it has, the Courts cannot enforce a tax against it. The question must be left between the Legislature, the corporation, and the people.

The charter of the *City of Madison* authorizes a tax upon bank stocks; but that charter was enacted in 1848, prior to the charter of the Bank of the State of *Indiana*, and, hence, may be controlled by the latter. The *City of Madison* can tax such bank stocks, existing within her limits, as the law of the land does not forbid her to tax.

The tax in controversy was levied upon stock in the Bank of the State of *Indiana*; and the question is, can the city tax the stock? A short inquiry into the mode in which taxes are to be levied upon corporation stocks, will aid us in understanding, and correctly elucidating, the question. Two ideas prevail in *Indiana* on the subject. One is, that the mode of taxing the capital stock of a corporation is an assessment against the corporation itself, by name, for the whole amount of its capital stock, which assessment the corporation pays and charges up to the stockholders, or deducts from the profits of the corporation, thus diminishing the dividends. The other idea is, that the stockholders are to be separately and severally listed by the assessor for the amount of the capital stock which they may own in a corporation.

That this latter is the mode to be adopted, in all cases where statute law does not direct otherwise, is settled by the case of *Conwell v. The Town of Connersville*, 15 Ind. 150.

The tax law of *Indiana*, enacted when the State Bank of *Indiana* was alive, prescribed the former of the above modes for the taxation of the capital stock of that institution, by the State and counties, but said nothing as to a special mode of taxation by municipal corporations. If such corporations, therefore, could have taxed her capital stock, they would necessarily have had to adopt the second mode above specified, that is to say, the taxation of the stock of each holder separately.

And we may observe, that the tax law above mentioned, has been considered as in force, and applicable to the Bank of the State of *Indiana*, so far as State and county taxation is concerned, and has furnished the mode in which the taxes for those purposes have been assessed; and, probably, this is right. Policy dictates that it should be so; as, otherwise, foreign stockholders in an institution created by our State, might secure exemption from taxation here upon their stock, which ought not to be. But there is no special statute prescribing the mode in which municipal corporations shall tax corporation stocks; and, of course, where they can tax them at all, they must tax them by assessing the individual stockholders. This is decided in *Conwell v. Connersville*, *supra*.

But the charter of the Bank of the State of *Indiana* declares that "the capital stock of said bank or branches shall not be taxable for municipal purposes." § 15 of the charter. This reaches to all the legal modes by which, but for the prohibition, the stock could be taxed by municipal corporations. The prohibition is decisive, if valid. That it is valid, has already been repeatedly decided. *Connersville v. The Bank, &c.*, 16 Ind. 105; and cases cited in *Conwell v. Connersville*, *supra*.

Per Curiam.—The judgment is reversed, with costs. Cause remanded, with instructions to grant a perpetual injunction.

C. E. Walker and *A. W. Hendricks*, for the appellant.

Jer. Sullivan, for the appellee.

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BIRD *v.* STUMPH and Others.

MURDOCK
v.
FORD.

Tuesday,
November 26.

APPEAL from the *Marion* Common Pleas.

Per Curiam.—This was an action by the appellees, who were the plaintiffs, against *Bird*, upon a promissory note for the payment of \$350, payable to one *Robert L. Walpole*, who assigned it to the plaintiffs. The record shows that the defendant was duly served with process, and having failed to appear, was regularly defaulted, and judgment by default entered against him. But no motion appears to have been made to set aside the default. Hence the errors assigned are not available in this Court. 9 Ind. 236; 13 *id.* 430, 453.

The judgment is affirmed, with 5 per cent. damages and costs.

R. L. Walpole, for the appellant.

MURDOCK *v.* FORD and Others.

Where a prior mortgagee, at the time of filing his bill for foreclosure, has either actual or constructive notice of a junior mortgage, or other subsequent incumbrance, he is bound to make the holder thereof a party to the action, or the proceedings therein will not affect him.

Where several notes maturing at different times are secured by the same mortgage, they are like so many successive mortgages; the first one due has priority, and the others come in, in the order in which they mature.

If the notes secured by a mortgage are held by different persons, and the holder of the deferred notes is not made a party to a proceeding by the holder of the first notes for a foreclosure, his rights are not affected, and he may redeem, as against a purchaser on such decree.

The purchaser is, in such case, if he goes into possession under the sheriff's sale, liable to be charged with the rents, and also with waste committed by him.

Tuesday,
November 26.

APPEAL from the *Benton* Circuit Court.

DAVISON, J.—The appellant, who was the plaintiff, brought an action against the appellees, alleging, in his complaint, these facts: *Elieazer Ford*, on October 9, 1855, executed to

one *John Murdock* five, several, promissory notes, each for the payment of \$1,077; the first payable on or before *March 1, 1857*; the second by *March 1, 1858*; the third on *March 1, 1859*; the fourth by *March 1, 1860*, and the fifth on or before *March 1, 1861*. To secure the payment of these notes, *Eliazer Ford*, and *Margaret Ford*, his wife, executed to *John Murdock* a mortgage on certain land in *Benton* county. After this, *John Murdock* assigned the first and second notes, those maturing in *March, 1857*, and *March, 1858*, to one *Caldwell*, who assigned them to *David H. Denny*. At the *March* term, 1858, *Denny*, having instituted suit on the mortgage, recovered a judgment in the *Benton* Circuit Court against *Ford* and wife, on said two notes, and also a decree of foreclosure against them, in the usual form, foreclosing all equity of redemption that they, or either of them, had in the premises. *John Murdock*, though he was still the holder of the last three notes, was not made a party to the suit in which the decree was rendered, or, in any way, notified of its pendency. In *September, 1858*, the sheriff, by virtue of an order of sale issued on said decree, sold the mortgaged premises to *Edward C. Sumner*, for \$1,550, and, pursuant to the sale, made him a sheriff's deed. On *June 13, 1859*, *John Murdock* assigned the last three notes to *William T. Murdock*, the plaintiff, who, before he commenced this suit, applied to *Sumner* to redeem the land described in the mortgage, and tendered him the full amount of the principal and interest of the decree, which had been assigned to him, and under which he had purchased; but he refused to accept the amount tendered, or to admit any right or claim of the plaintiff in the premises. It is averred that *Sumner*, upon receipt of the sheriff's deed, took possession under his purchase, and has ever since enjoyed the rents and profits of the land, which are alleged to be worth \$1,000, and has removed rails, and committed waste, to the amount of \$800. The relief prayed is, that an account be taken of what is due *Sumner*, if any thing, on account of said judgment and decree; that he be adjudged liable for rents and profits, and waste, and that the plaintiff be allowed to redeem; and, further, that said land when so redeemed,

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FORD. be decreed liable to be sold for the payment of said notes and mortgage, &c. Defendant's answer relies, for defense, upon the decree, order of sale, and sheriff's sale to *Sumner*. To which the plaintiff replied, reiterating, substantially, the facts stated in his complaint. Demurrer to the reply sustained, and final judgment given for the defendants.

Has the plaintiff a right to redeem? This is the controlling inquiry in the case. The appellant argues that *John Murdock*, the holder of the last three notes, stood in the relation of a junior mortgagee of the land; that he ought to have been, but was not, made a party to the suit for foreclosure; and therefore his rights could not be affected by the decree. To a suit to foreclose, a junior mortgagee is certainly a proper, if not a necessary, party; because, "where a prior mortgagee, at the time of filing his bill, has either actual or constructive notice of a junior mortgage, or other subsequent incumbrance, he is bound to make the holder thereof a party to the action, or the proceedings therein will not affect him." *Haines v. Beech*, 3 Johns. Ch. 454; *Shaw v. Hoadley*, 8 Blackf. 165; *Branch Bank, &c. v. Taylor*, 10 Ala. 70; *Swift v. Edson*, 5 Conn. 531; *Cooper v. Martin*, 1 Dana, 23; 2 Hilliard on Mort. 131; Story Eq. Pl., § 192, and notes. Indeed, the general rule in equity is, that all persons materially interested, whether legally or beneficially, in the subject matter of the suit, are to be made parties to it, as plaintiffs or defendants, so that there may be a complete decree, that shall bind them all. Story's Eq. Pl., § 72. See, also, 2 R. S., §§ 17, 18, pp. 30, 31. Thus, it is evident, that the rights of *John Murdock*, whatever they may be, in the mortgaged premises, could not be affected by the decree of foreclosure, for the obvious reason that he was no party to the suit in which it was rendered.

What, then, are his rights? If, as contended, he stood in the relation of a junior mortgagee of the land, he had an undoubted right to redeem, as against *Sumner*, because, as the sheriff's vendee, he acquired title only against the parties to the suit, which can not be set up against the subsisting equity of those who were not parties. *Haines v. Beech*, *supra*; *Kimmell v. Willard*, 1 Doug. (Mich. Rep.) 217; 1 Hilliard on Mort. 300, *et seq.*; *Branch Bank, &c. v. Taylor*, *supra*;

2 Story's Eq. Jur., § 1023. And it must be conceded, that if as a junior mortgagee, *John Murdock* had a right to redeem, his assignment of the last three notes and mortgage to the plaintiff, conferred on him the same right. But it remains to be inquired, whether *John Murdock* really did occupy the relation of a junior mortgagee? We have decided that notes secured by mortgage, and due at different times, are like so many successive mortgages; the one first due has priority and the others come in, in the order in which they mature *Hough v. Osborne*, 7 Ind. 140; *Harris v. Harlan*, 14 Ind. 430; *Bank v. Tweedy*, 8 Blackf. 447; *Stanley v. Beatty*, 4 Ind. 134. It is, however, insisted that the mortgage, in this instance, created but one lien, one defeasance, and one equity of redemption, which were extinguished by the decree and sale to *Sumner*. We are not, in view of the facts stated inclined to adopt that construction. True, the general rule of law is, that a foreclosure and sale of the mortgaged premises invests the purchaser with the fee simple, and the mortgage becomes extinct; but there are cases, and we think this is one of them, in which a court of equity will consider an incumbrance alive, in order that the purposes of justice may be subserved. *Howe v. Woodruff*, 12 Ind. 214, and cases there cited. And, moreover, *John Murdock*, the holder of the junior incumbrance, in this case, was not a party to the suit which resulted in the decree, and, in consequence, the result of that suit can not be allowed to impair, in any degree, his rights under the mortgage. And his assignee, the plaintiff, has, it seems to us, adopted the proper remedy. Having tendered the full amount of the judgment and interest, he has the right to redeem.

And having that right, it seems to follow, that *Sumner*, being in possession of the mortgaged premises, in virtue of a sheriff's sale under the prior mortgage, is liable for rents and profits, and, also, for waste. The principle is, "that the party in possession is entitled, only, to what is equitably due, after deducting what has come to his hands from the estate," and, also, what has been lost to the estate by his commission of waste. 1 Hilliard on Mort. 417, 433; *Latimer v. Moore*, 4 McLean, 110; *Moore v. Degraw*, 1 Halst. Cha. 346; *Givens*

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JUSTICE therefore, be reversed.

v. *Pec Curiam*.—The judgment is reversed, with costs.
THE STATE. Cause remanded, &c.

H. W. Chase and *J. A. Wilstach*, for the appellant.

KOMBLITH and Others v. COLLINS and Others.

Tuesday,
November 26.

APPEAL from the *Hendricks* Circuit Court.

Pec Curiam.—This suit is brought to set aside conveyances of lands to one *Michael Collins*, averred to have been fraudulently procured by one *Thomas Collins*, by whom the consideration was paid, to defraud the creditors, “prior and subsequent,” of said *Thomas*. These conveyances were made in 1855, and 1856. Plaintiffs recovered a judgment in 1858. When their debt was created is not shown; nor is it shown, directly, that any debts then existed against said *Thomas*, nor that his estate was not fully sufficient to pay his debts, without a resort to these lands.

A demurrer was sustained to the complaint. We see no error in that ruling.

The judgment is affirmed, with costs.

C. C. Nave and *J. Wilherone*, for the appellants.

JUSTICE v. THE STATE.

The Court of Common Pleas has jurisdiction in felonies, only in certain specified cases, and the information must show, on its face, such a state of facts as entitles the Court to entertain such jurisdiction.

The information must show that the felony, on charge of which the defendant is alleged to be in custody, is the same felony for which the information is filed. Nov. Term,
1861.

Where a party is charged with a felony, in a Court not having jurisdiction over the subject matter, the defect of jurisdiction can be taken advantage of on motion to quash, or, in arrest of judgment, or, on appeal. JUSTICE
V.
THE STATE.

APPEAL from the *Knox* Common Pleas.

*Tuesday,
November 26.*

WORDEN, J.—Information against the appellant, charging, “that a man calling himself *William Justice*, being a person now in the custody of the sheriff of said county, on a charge of felony, before and without indictment by the grand jury, at the county of *Knox*, and State of *Indiana*, on or about *December 4, 1859*, did, then and there, feloniously steal, take, carry, lead, and drive away, a certain brindle-colored milch cow, of the value of twenty-five dollars, being the personal property, then and there, of *Thomas Bishop*, then and there being found.”

On this information, the defendant was tried, convicted, and sentenced to the penitentiary for the term of five years. The appellant has assigned errors, raising a question as to the jurisdiction of the Court below.

The Court of Common Pleas has jurisdiction in felonies, only in certain specified cases, and the information must, on its face, show such a state of facts as entitles the Court to entertain such jurisdiction. *McCarty v. The State*, 16 Ind. 319.

In the information before us, no fact is alleged, giving the Court jurisdiction, unless it be that the defendant was in custody on a charge of felony, and that no indictment had been found against him. Whether this is sufficient to give the Court jurisdiction, depends upon the construction which should be given to the following statutory provision, viz., “The Court of Common Pleas, in the several counties of this State, shall have original jurisdiction of felonies, not punishable with death, concurrent with the Circuit Court, in the following cases:

First. When a person is in custody on a charge of felony, before indictment by the grand jury.” Acts 1859, § 2, p. 94.

This provision, as we construe it, contemplates that the

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party is to be in custody on a charge of the particular felony of which the Court is to take jurisdiction. It was clearly not the intention of the Legislature to authorize the Court of Common Pleas, because a party is in custody on a charge of one felony, to try him on a charge of another. If this were the case, if a party were in custody on a charge punishable with death, of which the Court of Common Pleas can, in no case, have jurisdiction, he might, for this reason alone, be tried and convicted in the Common Pleas for an inferior offense.

The information fails to show jurisdiction in the Court below over the offense charged, because it alleges that the defendant was in custody on a charge of felony only, and not that he was in custody on a charge of the felony for which the information was filed.

But it is insisted, that as there was no motion in the Court below, either to quash the information, or to arrest the judgment, the error is not now available. We are of a different opinion. Where a party is charged with a felony, in a Court not having jurisdiction over the subject matter, the defect of jurisdiction can be taken advantage of on motion to quash, in arrest of judgment, or on appeal.

Per Curiam.—The judgment is reversed, and the cause remanded. The clerk will certify proper directions for the return of the appellant to the proper county.

J. A. Thornton, J. E. McDonald and A. L. Roache, for the appellants.

James G. Jones, Attorney General, for the State.

LANE v. MILLER and Others.

Suit by *A.* against *B., C., and D.*, to recover damages for backing water upon the lands of the plaintiff. On the trial, the defendants offered and gave in evidence, over the plaintiff's objection, the record of a proceeding upon a writ of *ad quod damnum*, in the same Court, upon the petition of the grantors of the defendants. The petition for the writ did not name any of the proprietors whose lands it was supposed would be affected by

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the dam. The inquest of the jury set out that they had examined the land about the site of the proposed dam, and named several persons whose land might be affected, but did not name the grantors of the plaintiff, nor did it describe any land which would probably be affected. Notice was given only to the persons named in the inquest, and they not appearing, the inquest was confirmed, and leave given to erect the dam. The Court instructed the jury, that only the owners who would probably be injured need be named in the inquest, and the plaintiff's grantors not being named, the inference was, that in the estimation of the jury, they would not be injured by the erection of the dam, and that the record of the *ad quod damnum* was properly in evidence to show that the defendants had a right to build such a dam; but that if A., or his grantors, had no notice of the proceedings, then the plaintiff's claim would not be barred; but persons not named are barred, if they in any manner had sufficient notice of the proceedings to know what was going on; and whether the notice be written or verbal makes no difference.

Held, that the record was improperly admitted in evidence, and that the instruction of the Court was erroneous; that the person applying for leave to build a dam, acquires the right to do so, only as against those whose lands the jury find will probably be affected, and who are notified, as provided by the statute.

Held, also, that the doctrine of *lis pendens* had no application to the case; as, though the parties who then owned the land might actually have known of the pendency of the proceeding, yet they had a right to presume that, if the jury supposed their lands would be injuriously affected, they would be notified and made parties.

Held, also, that where an error is committed, in the admission of incompetent testimony, and the giving of an erroneous charge based upon it, there is no necessity that the record should contain all the evidence given in the cause, or that the case should be specially stated in accordance with § 347 of the code, in order to have the error reviewed in the Supreme Court.

APPEAL from the Orange Circuit Court.

WORDEN, J.—Suit by *Lane*, against the appellees, to recover damages for maintaining a mill-dam, and backing water upon the lands of the plaintiff.

Tuesday,
November 26.

Issue, trial, verdict and judgment for the defendants.

On the trial, the defendants offered, and gave in evidence, in order to establish a right to overflow the plaintiff's land, the record of certain proceedings upon a writ of *ad quod damnum*, had in the same Court, upon the petition of *Joseph Rober's* and *Martin Rigney*, under whom the defendants claim.

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Roberts and Rigney, who owned the mill-site, proceeded, by way of *ad quod damnum*, to condemn the lands above the proposed dam, which, it was apprehended, would be affected thereby. The petition for the writ did not name any of the proprietors whose lands, it was supposed, would be affected by the dam. *William Cathcart*, and the heirs of *William Wolfington*, from whom the plaintiff derives title, were then the owners of the land now alleged to be overflowed. The inquest returned by the jury sets out, that they had examined the lands above and below the point of the proposed dam, which probably might be overflowed or injured, and names several persons whose lands might be affected; but does not name *Cathcart* nor *Wolfington*, nor does it describe any lands which would probably be affected. Notice was given to such persons, only, as were named in the inquest. They not appearing, the inquest was confirmed, and leave given to erect the dam, to the height of eight feet above low water mark. The persons owning the land, for the overflowing of which this suit was brought, were not named in the proceedings, nor were the lands mentioned or described.

The plaintiff objected to the introduction of this record, on the ground that the then owners of the land were not parties thereto, and were not notified, &c. The objection was overruled, and exception taken.

The Court instructed the jury that, "The owners who would probably be injured, were bound to be named (in the inquest); those who would not probably be injured were not bound to be named: and, I think the fair construction is, that this plaintiff, or the former owners of the land, were not named, because, in the opinion of the jury, they would not probably be injured by such a dam as they describe in the inquest. The *ad quod damnum* is, therefore, properly before you, to show that the defendant had a right to build such a dam as the judgment of the Court describes; but if you find, on the proof, that *Lane*, or his grantors, had no notice of the proceedings, then the claim of the plaintiff, in this suit, would not be barred by such proceeding. The Revised Statutes require that notice of the inquest should

be given, in writing, to all the persons named therein as affected; other persons, not named therein, are bound, if they, in any manner, have sufficient notice of the proceedings to know what is going on. Whether the notice be written, or verbal, makes no difference." Exception was taken to this charge.

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We are of opinion that the record was improperly admitted in evidence, and that the instruction given to the jury was wrong. The general rule is, that none but parties and privies are bound by a judgment. There is nothing in the nature of these proceedings that should take them out of the general rule. On the contrary, the property of one man can be appropriated to the use of another, against the will of the former, only through the exercise of the right of eminent domain, for purposes deemed for the public good, and upon compensation being paid therefor. The validity of a law might well be questioned, which should, by its terms, authorize proceedings by which one man should acquire the right to overflow the lands of another, without, in some way, making the latter a party to such proceedings. The statute of 1843, under which the proceedings in this case were had, does not, as we think, admit of such construction. R. S. 1843, p. 944. By this statute, the jury are required to examine the lands which may probably be overflowed or injured, and say what damage it will be to the several proprietors, naming them; and, thereupon, the sheriff is required to give notice, in writing, to such proprietors, to show cause why the person applying should not have leave to build his dam. It seems to us clear, that the person applying for leave to build a dam, acquires the right to do so as against those only whose lands the jury find will probably be affected, and who are notified, as provided for by the statute. *Vide Honenstine v. Vaughan et al.*, 7 Blackf. 520. The jury, as was said in the charge of the Court, are not required to name those whose lands will not probably be injured by the erection of the proposed dam; but it by no means follows that such persons, when not named, or in any manner made a party to the proceedings, are bound by the opinion of the jury, that

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their land will not be injured. The Court below said, correctly, that the fair construction was that the owners of the land were not named, because, in the opinion of the jury, they would not probably be injured. The jury are not, by the terms of the statute, required to look beyond probabilities. There might be a serious injury resulting from the erection of a dam which was not foreseen by the jury, and, which, to them, did not seem probable. The 116th section of the statute provides for such cases. It says: "But such inquest of said jurors, and affirmation thereof by the Court, shall not bar any action which any person would have had for any subsequent damage or injury if this law had never been passed, other than for such damages or injuries as were actually foreseen and decided upon by the jury." *Vide Smith v. O'mstead*, 5 Blackf. 37.

It is claimed that the parties under whom the plaintiff claims, were bound by the proceedings, on the principle of *lis pendens*. We do not think the doctrine of *lis pendens* has any application to the case. The parties who then owned the land may, perhaps, be presumed to have known of the proceedings pending, but if so, they must be presumed to have known, also, that if the jury supposed their lands would be affected injuriously by the proposed dam, they would be properly notified, and made parties; and that if the jury did not foresee such injury, the proceedings would not affect them.

Another question of evidence is raised. On the trial, the plaintiff offered to prove by one of the jurors who made the inquest, that the jury did not consider whether any damage would be done to the lands mentioned in the complaint. The juror was held incompetent to testify to this fact. The view which we take of the record offered, and given in evidence, renders it unnecessary to pass upon the question thus presented.

There is another instruction complained of, as being contrary to law, and as being outside of any of the issues in the case. By an agreement of the parties, filed with the record, there appears to have been an issue of fact, to which the instruction was applicable. The evidence is not in the record,

and without inquiring whether the instruction was abstractly correct, we think there might have been a state of facts, applied to which the instruction would have been correct.

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A preliminary point, made by the appellees, remains to be disposed of. As the evidence is not in the record, and as the case is not stated specially, in accordance with § 347 of the code, it is insisted that no question is presented by the record. *Nay v. Byers*, 13 Ind. 412, is relied upon to support this position. That case does not sustain the position. It has never, that we are now aware of, been decided, that in order to present a question properly to this Court, the record must, in all cases, contain the evidence, or present a case specially stated, according to the provisions of the section cited. In *Nay v. Byers*, an instruction was asked and refused. The evidence not being in the record, it was presumed that the instruction was rightly refused, because not correct, as applied to the case made by the evidence. An instruction was also given, which, it was contended, was not justified by the evidence. It was held, that upon a case that might have been made by the evidence, under the issues, the instruction was correct. The evidence not being in the record, it was presumed that such was the case made. The Court say, having reference, of course, to the questions presented, that "the record should have contained all the evidence given in the cause, or a case specially stated by the Court, pursuant to § 347, 2 R. S. 1852, p. 116, in order to have subjected the particular ruling of the court below to a review in this court." This case is abundantly clear. Without the evidence, or a case stated to show the application of the charges asked and refused, there was nothing to show that any error was committed. There are many cases running through our reports, where judgments have been reversed for errors other than those committed in reference to the validity of pleadings, the record containing neither the evidence nor a case stated in accordance with the provisions of the section mentioned. It would seem that when an error is committed, as in this case, in the admission of incompetent testimony, and the giving of an erroneous charge upon it, there is no necessity that the record should contain

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The plaintiff duly moved for a new trial, on the ground of the erroneous admission of the testimony, and erroneous charges given.

Per Curiam.—The judgment is reversed, with costs. Cause remanded, &c.

R. Crawford, for the appellant.

J. & A. B. Collins, for the appellees.

17	64
197	291
17	64
130	376
17	64
162	180

BELLOWS and Another v. MCGINNIS.

A., by his will, devised certain real estate to his wife for life, and at her death to be sold by his executor to the highest bidder among his children. The widow leased the land for the term of her life to one *B.*, who, after her death, continued in possession as a tenant at sufferance. In *September*, 1858, the executor sold the land to a child of the testator, who assigned his certificate of purchase to *C.*, a married woman. The sale was confirmed by the Court, *January* 3, 1859, and the executor ordered to make a deed to *C.*, which he did on *March* 7, 1859. Suit by *C.* and her husband against *B.*, alleging, that on *January* 4, 1859, and on divers other days, between that day and *March* 10, 1859, the said *B.* wrongfully, and without license, turned a large number of hogs upon a meadow, part of said real estate, whereby the same was rooted up and injured; and also dug up and carried away a large number of fruit trees.

Held, that the husband was properly joined with the wife, as plaintiff.

Held, also, that when the deed was executed, it related back to the time the sale was confirmed and the deed ordered, so as to vest in *C.* the same rights as if the deed had been then executed and delivered.

Held, also, that the facts stated in the complaint constituted a good cause of action.

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November 26.

APPEAL from the *Clark* Circuit Court.

WORDEN, J.—This was an action by *Bellows* and wife,

against *McGinnis*. Demurrer to the complaint sustained, Nov. Term, 1861.
and exception taken. Judgment for the defendant.

The complaint, in substance, states the following facts: One *George Goss* died seized of a certain tract of land, described in the complaint. He devised the land to his widow, *Mary Goss*, for the term of her natural life, with power and direction to his executor to sell the land, after the decease of his widow, to the highest bidder among his children who should then be living. The widow leased the land to the defendant, *McGinnis*, for the term of her life. She died in 1858, and the defendant remained in possession of the premises, as tenant at sufferance, after her death. On *September* 11, 1858, the executor, in pursuance of the power contained in the will, sold the land to *Samuel Goss*, one of the children of the testator, and gave him a certificate of purchase therefor. *Samuel Goss* assigned the certificate to *Nancy Bellows*, one of the plaintiffs.

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That afterward, the executor reported the sale, and his proceedings in the premises, to the Court of Common Pleas of *Clark* county, and such proceedings were thereupon had by the Court, that on *January* 3, 1859, the sale was in all things confirmed, and it was ordered that the executor should execute to said *Nancy*, as the assignee of *Samuel Goss*, a deed of conveyance for the premises, the receipt of the purchase money being acknowledged by the executor. On *March* 7, following, a deed was executed accordingly. That the defendant, *McGinnis*, being in the possession and occupancy as stated, on *January* 4, 1859, and on divers other days, between that day and the 10th day of *March* following, wrongfully and unjustly, and without the leave of said *Nancy*, turned a large number of hogs and cattle upon a field of clover and upon a meadow, a part of said premises, whereby the clover field and meadow were rooted up and injured; and that the defendant, at the times aforesaid, did also dig up, take away and destroy one hundred fruit trees, and twenty grape vines, of the value of one hundred dollars, before that time planted and growing upon said premises, the property of the said *Nancy*, by means whereof, &c.

We discover no defect in the title of *Nancy Bellows*, as

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set out, and none has been pointed out to us, no brief having been filed for the appellee. The will, and other papers on which her title is based, are copied and made a part of the complaint. The suit was properly brought in the name of the husband and wife. 2 R. S. 1852, § 8, p. 28. See *Martindale v. Tibbets*, 16 Ind. 200.

The main question involved seems to be, whether the action can be maintained by the plaintiffs for the alleged injury, committed after the confirmation of the sale, and before the deed was made, the defendant in the mean time being in the possession of the land.

The sale, we have seen, was confirmed on *January 3, 1859*, and a deed ordered to be made. The deed, however, was not executed until *March 7*, following. The injury complained of, is alleged to have been committed on the 4th day of *January*, and on other days, between that and *March 10, 1859*. There can be no doubt, that, upon the confirmation of the sale, *Nancy Bellows* became vested with an equitable estate in the land, although the legal title did not then pass to her. It may be doubted whether, under the statute authorizing and requiring suit to be brought by the real party in interest, this equitable estate would not have been sufficient, of itself, to warrant the suit; but we do not so decide, nor place the case upon that ground.

We think it clear, that when the deed was executed, it related back to the time the sale was confirmed and the deed ordered, so as to vest in *Nancy* the same rights as if the deed had been then executed and delivered. This view is fully sustained by the case of *Jackson v. McMichael*, 3 Cow. 75, and authorities there cited. See, also, upon this point, *Landes v. Brant*, 10 Howard, 348; *Smith v. Allen*, 1 Blackf. 22. The doctrine is, that "*where there are divers acts concurrent to make a conveyance, estate or other thing, the original act shall be preferred; and to this the other acts shall have relation.*" Here, three things were necessary to vest the estate in *Nancy Bellows*, viz., *first*, a sale by the executor; *second*, a confirmation of the sale by the proper Court, and an order for the making of a conveyance; and, *third*, the execution of such conveyance. 2 R. S. 1852, § 92.

p. 269, *et seq.* Perhaps the deed, when executed, would relate back to the time of the sale by the executor; but we need not decide this point, as the injury is alleged to have been committed at a time subsequent to the confirmation.

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We regard *Nancy Bellows* as having, by relation, the legal title to the land, at the time of the alleged injury. Perhaps, she could not have maintained an action of trespass, the defendant himself being in possession, and trespass being regarded as an injury to the possession merely; but there can be no doubt that an action on the case, in the nature of waste, would lie against him by the owner of the fee. 2 Hilliard on Torts, § 30, p. 306. Such action may, undoubtedly, be brought against one in possession. We regard the injury charged as amounting to waste, for which an action will lie. All distinction, so far as form of action is concerned, between trespass and case being abolished, the only question is whether the complaint states facts sufficient to constitute a cause of action. We think it does, and, therefore, that the demurrer should have been overruled.

Per Curiam.—The judgment is reversed, with costs. Cause remanded, &c.

Thomas L. Smith and *M. C. Kerr*, for the appellants.

R. Crawford, for the appellee.

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Where a cause is tried by a stranger, not by the legal and judicially recognized judge, the record must show the right of such stranger to act.

APPEAL from the *Howard* Common Pleas.

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Per Curiam.—The judgment in this case must be reversed, on the authority of *Negley v. Wilson*, 14 Ind. 215; *Seymour v. The State*, 15 Ind. 288; and *Redwine v. The State*,

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party is to be in custody on a charge of the particular felony of which the Court is to take jurisdiction. It was clearly not the intention of the Legislature to authorize the Court of Common Pleas, because a party is in custody on a charge of one felony, to try him on a charge of another. If this were the case, if a party were in custody on a charge punishable with death, of which the Court of Common Pleas can, in no case, have jurisdiction, he might, for this reason alone, be tried and convicted in the Common Pleas for an inferior offense.

The information fails to show jurisdiction in the Court below over the offense charged, because it alleges that the defendant was in custody on a charge of felony only, and not that he was in custody on a charge of the felony for which the information was filed.

But it is insisted, that as there was no motion in the Court below, either to quash the information, or to arrest the judgment, the error is not now available. We are of a different opinion. Where a party is charged with a felony, in a Court not having jurisdiction over the subject matter, the defect of jurisdiction can be taken advantage of on motion to quash, in arrest of judgment, or on appeal.

Per Curiam.—The judgment is reversed, and the cause remanded. The clerk will certify proper directions for the return of the appellant to the proper county.

J. A. Thornton, J. E. McDonald and A. L. Roache, for the appellants.

James G. Jones, Attorney General, for the State.

LANE v. MILLER and Others.

Suit by *A.* against *B., C., and D.*, to recover damages for backing water upon the lands of the plaintiff. On the trial, the defendants offered and gave in evidence, over the plaintiff's objection, the record of a proceeding upon a writ of *ad quod damnum*, in the same Court, upon the petition of the grantors of the defendants. The petition for the writ did not name any of the proprietors whose lands it was supposed would be affected by

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the dam. The inquest of the jury set out that they had examined the land about the site of the proposed dam, and named several persons whose land might be affected, but did not name the grantors of the plaintiff, nor did it describe any land which would probably be affected. Notice was given only to the persons named in the inquest, and they not appearing, the inquest was confirmed, and leave given to erect the dam. The Court instructed the jury, that only the owners who would probably be injured need be named in the inquest, and the plaintiff's grantors not being named, the inference was, that in the estimation of the jury, they would not be injured by the erection of the dam, and that the record of the *ad quod damnum* was properly in evidence to show that the defendants had a right to build such a dam; but that if A., or his grantors, had no notice of the proceedings, then the plaintiff's claim would not be barred; but persons not named are barred, if they in any manner had sufficient notice of the proceedings to know what was going on; and whether the notice be written or verbal makes no difference.

Held, that the record was improperly admitted in evidence, and that the instruction of the Court was erroneous; that the person applying for leave to build a dam, acquires the right to do so, only as against those whose lands the jury find will probably be affected, and who are notified, as provided by the statute.

Held, also, that the doctrine of *lis pendens* had no application to the case; as, though the parties who then owned the land might actually have known of the pendency of the proceeding, yet they had a right to presume that, if the jury supposed their lands would be injuriously affected, they would be notified and made parties.

Held, also, that where an error is committed, in the admission of incompetent testimony, and the giving of an erroneous charge based upon it, there is no necessity that the record should contain all the evidence given in the cause, or that the case should be specially stated in accordance with § 347 of the code, in order to have the error reviewed in the Supreme Court.

APPEAL from the Orange Circuit Court.

WORDEN, J.—Suit by *Lane*, against the appellees, to recover damages for maintaining a mill-dam, and backing water upon the lands of the plaintiff.

Issue, trial, verdict and judgment for the defendants.

On the trial, the defendants offered, and gave in evidence, in order to establish a right to overflow the plaintiff's land, the record of certain proceedings upon a writ of *ad quod damnum*, had in the same Court, upon the petition of *Joseph Robert's* and *Martin Rigney*, under whom the defendants claim.

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Nov. Term, 1861. *was entitled under the will of her late husband, William G. Ewing, who died in the year 1854. There was a finding and judgment for the plaintiff. The will contains this provision:*

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"The homestead on lots Nos. 7, 8, 10, 11 and 12, block No. 18, *Ewing's* addition to the town of *Fort Wayne*, and north half of back lot No. 3, containing about eight acres, part of the east half, N. W. qr., Sec. 11, Town. 38, Range 12, E. (balance to *William G. Ewing, Jr.*, as hereafter provided,) and the rents and profits of one half of all the improved and productive real estate that I own with *George W. Ewing*, or otherwise, or an amount equal to one half of all my interest therein, *to be set apart as dower*, for my beloved wife, *Esther Ewing*, during her life; and first, out of said rents, the taxes and necessary repairs ~~are~~ to be paid; and *likewise to have half my share of any dividends I may be entitled to on bank stock*; and likewise so much of the furniture of the homestead as she will need, and desire to keep, say one half or two thirds, with a horse and buggy, and sleigh, and a wagon and pair of horses, and necessary harness, and two cows, likewise one cart and harness. The one third, or excess of furniture, that she will not need, I desire her to give to our adopted son, *William G. Ewing, Jr.*, if he is alive, if not, then to my neices, *Mary L., Lavina Ann, and Catherine Esther Ewing*. Said *William G. Ewing, Jr.*, to have my best saddle horse, saddle and bridle, and my clothing. My gold watch I give to my nephew, *William G. Ewing*, of Cincinnati."

The evidence proves that *William G. Ewing*, the testator, at his death, was seized of real estate worth \$100,000, and was the owner of personalty to a large amount, independent of that described in the bequest to his wife. And it was also proved that *Esther Ewing*, after the death of her husband, elected to take under the law, then in force, her interest in the real estate of which he died seized, instead of the provision made for her in the will, in lieu of dower; and at the same time, so far as she could, elected to take the personal property so devised to her. In this case, the only question to settle is, does the election thus made, deprive

the widow of all the property given her by the will? If it does, she can not, of course, recover the dividends of the bank stock. But the appellee argues that, although "she is not entitled to any lands, or any pecuniary, or other interest made for her by the will, in lieu of her right to the lands of her husband," still, "she is entitled to the personal property, because the will plainly shows that she should have it, as an independent bequest, not to be affected by any election on her part, in reference to the realty."

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The statute "regulating the apportionment of estates," says: "If lands be devised to a woman, or a pecuniary or other provision be made for her by the will of her late husband, in lieu of her right to lands of her husband, she shall make her election, whether she will take the lands so devised, or the provision so made, or whether she will retain the right to one third of the lands of her late husband; but she shall not be entitled to both, unless it *plainly* appears by the will, to have been the intention of the testator that she should have such lands, or pecuniary or other provision thus devised or bequeathed, in addition to her right in the lands of her husband." 1 R. S., § 41, p. 255.

As has been seen, the testator having devised "the homestead," (describing it,) and one half the rents of certain lands, "to be set apart as dower," for his, the testator's wife, proceeds thus: "and likewise to have one half of any dividends I may be entitled to on bank stock." If the phrase, "to be set apart as dower," applies alone to the devise which precedes it, there is reason for the construction assumed by the appellee; but the appellant insists that the word "likewise," in the connection in which it was used, applies the phrase in question, alike, to all the property devised to the widow by the will. *Walker* defines the word "likewise" thus: "in like manner, also, moreover, too." Do these definitions connect that part of the will by which the personalty is bequeathed to her, with the previous devise of the realty, so as to make the whole provision a unit? At common law, the rule is, "that a widow can not take a provision made by the will, *expressly* in lieu of dower, and at the same time take her dower. In such case, she must *elect* to take one or the other.

Nov. Term, 1861. But it was presumed that the testator intended to give her the provision, in addition to the dower, unless *it p'ainly* appeared from the will, that it was his intention to give her the provision in lieu of dower." 2 Story's Eq. Jur., § 1088.

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EWING. This rule, however, is not, to its full extent, in force in this State; because, as has been seen, the statute presumes an intention to give such provision in lieu of the widow's interest in the realty, unless it *p'ainly* appears, from the will, that the testator intended to give it in addition to such interest. Thus, in *East v. Cook*, 2 Vesey, Sen., it is said, "if a man should, by his will, give a child, or other person, a legacy, or portion, in lieu or satisfaction of a particular thing expressed, that would not exclude him from other benefits, although it might happen to be contrary to the will, for courts of equity will not construe it as meant in lieu of every thing else, when the testator has said it is in lieu of a particular thing."

Jarman on Wills, in his chapter on general rules of construction, presents a summary of the several rules of which he had treated in detail, some of which we will notice, namely:

"VII. All the parts of a will are to be construed in relation to each other, and so as, if possible, to form one consistent whole."

"X. Courts will look at the circumstances under which the deviser makes his will; as the state of his property, of his family, and the like."

"XVI. Words, in general, are to be taken in their ordinary and grammatical sense, unless a clear intention to use them in another can be collected, and that other can be ascertained; and they are, in all cases, to receive a construction which will give to every expression some effect, rather than one that will render any of the expressions inoperative; and of two modes of construction, that is to be preferred which will prevent a total intestacy.

"XVII. Where a testator uses technical words, he is presumed to employ them in their legal sense, unless the context clearly indicates the contrary.

"XVIII. That words occurring more than once in a will, shall be presumed to be used always in the same sense, unless a contrary intention appears by the context, unless the words be applied to different subjects. And on the same principle, where a testator uses an additional word or phrase, he must be presumed to have an additional meaning." Keeping in view these rules, and our statute, we are prepared to examine the will of the testator.

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It is apparent from the will, that he died without issue, leaving a brother and sisters, nephews and nieces, and an adopted son; that he left a large estate, real and personal, and a heavy business in the hands of partners, which was to be closed up at a period not beyond five years, and after the payment of debts, the residue of the proceeds of the personalty was to be distributed, as designated in the will, among the persons above referred to. There is no provision, other than the one herein quoted, whereby any of the personalty, or its proceeds, was to pass to the widow; but there is a provision to the effect, that his estate, real and personal, subject to other provisions of the will, should be divided into fifteen parts, of which certain persons, not including the widow, were to take two, and others one, part or share. From the whole context, it is manifest that it was the intention of the testator, by the will, to make a final disposition of all his property, and it appears to do so, as to all except the personal property devised to the appellee, if she took but a life interest therein. No disposition of it, after her death, is made; but there is a special disposition of the homestead, after such event.

The first direction as to property is, that the testator's funeral expenses shall be paid, first, "and *likewise*" all his legal and just debts, as afterward provided.

Then follows the provision for the appellee; then that his adopted son should have certain interests during the life of appellee, and after her death; then follows the clause directing the manner of general distribution. The will then reserves from such general distribution, certain designated property, which is then bequeathed, to-wit: to his adopted son, "for a residence," . . . "*likewise*" one store room, and 20

Nov. Term, by 60 feet of ground on *Calhoun* street, &c., and *likewise* a
 1861. farm," &c.

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 V.
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To *Charlotte Walker*, there is bequeathed a lot, to be carved out of a designated out-lot in *Fort Wayne*; or, if she prefers it, a piece of some lot in *Logansport*, "of the value of three hundred dollars; and, *in like manner*, a like lot, of like value, to my niece, *America Ewing*," &c. To *William* and *Truman Griffith*, each, there is bequeathed "a good eighty-acre tract of land, to be selected and set apart by my executors; and, *in like manner*, an eighty-acre tract of land to *William Wallace*."

Construing the various provisions of the will, in which the word "*likewise*" occurs, with a view to the rules above quoted, and it seems to result that the first definition given by *Walker*, to wit: "*in like manner*," can not maintain; but that the same was more probably used with reference to its second definition, to wit: "also." This construction is manifest, when we look to other parts of the will, in which the words "*in like manner*" are used to convey a different meaning from what the word "also" would convey.

Considering the word "*likewise*" as meaning "also," in the clause of the will first above quoted; the state of the testator's property, and of his family; the fact that the technical word "dower," in the phrase, "to be set apart as dower," is used after the devise of the interest in the real property, and before that of the personalty; and the further fact, that if the bequest is to be considered as a whole, taken as such, as "dower," such construction would prevent the final disposition of the personal property so bequeathed to the wife, it would appear to be "plain," within the meaning of the statute, that the phrase, "to be set apart as dower," applies only to that which precedes it, and not to the disposition of the personalty. Giving the will this construction, makes provision for the final disposition of all the property, real and personal, and there would not, as to any of it, be an intestacy.

Regarding it in this light, we are disposed to give such effect to the will as shall make it operative to the final disposal of all the estate; and, consequently, so construe it

as to give the appellee an absolute right to the personal property bequeathed to her, notwithstanding her renunciation of the provisions of the will, as to the realty.

Per Curiam.—The judgment is affirmed, with 2 per cent. damages and costs.

John B. Howe and *L. M. Ninde*, for the appellant.

R. Brackenridge, Jr., *J. E. McDonald* and *A. L. Roache*, for the appellee.

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SMITH
v.
SMITH.

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SMITH and Others v. SMITH, Administrator of ELLSWORTH.

Trial and judgment at a regular term of the Circuit Court, in *October*, 1860. By adjournment, that term of the Court was continued until *November*, in the same year. At the adjourned term, an appeal was prayed, granted and perfected, by giving bond, &c. Motion by the appellee, in the Supreme Court, to dismiss the appeal, or for an order that the appeal should not operate to stay proceedings upon execution.

Held, that under the statute providing for adjourned terms, (Acts 1858, p. 37,) the adjourned term must be deemed a part of the regular term, and every step may be taken at such adjourned term, that might have been taken at the regular term.

Held, also, that where the Court is continued from the regular term to an adjourned term, the proceedings may be said to be *in fieri*, until the close of the adjourned term, and the records are, consequently, completely under the control of the Court.

APPEAL from the *Tipppecanoe* Circuit Court.

WORDEN, J.—Motion, by the appellee, to dismiss the appeal, or for an order that the appeal shall not operate to stay proceedings upon execution.

The cause was tried, and the judgment rendered, at the *October* term of the Court below, in the year 1860. That term of the Court was continued, by adjournment, until *November*, in the same year. At the adjourned term the appeal was prayed, and granted, and an appeal bond filed and approved by the Court.

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v.
SMITH.

The appellee insists, that the Court below had not jurisdiction to grant the appeal, and approve the bond, at the adjourned term, the judgment having been rendered at the regular term, and no appeal having then been prayed.

The statute provides, "That if, at the close of any Circuit Court of any county, or where it shall become necessary, or proper, for said Court to adjourn from any cause, and the business pending therein shall be unfinished, it shall be lawful for such Court to adjourn until some other certain time, to be specified in such adjourning order, of which public notice shall be given in some manner to be specified by such Court; and at such time, such Court shall meet, and continue in session so long as the business shall require; and such adjourned term shall be deemed a part of the regular term of such Court," &c. Acts 1858, p. 37.

The position assumed is, that the adjourned term is no part of the regular term, except for the purpose of disposing of unfinished business.

The argument implies, that whenever a judgment is passed in a cause, and the Court is continued to an adjourned term, it is out of the power of the Court to modify, set aside, or grant an appeal from, such judgment, at such adjourned term.

We do not, however, so interpret the statute. We think it is only where the business pending before the Court, is unfinished, that the Court is authorized to hold an adjourned term. Where the business is finished, there can be no necessity for such adjourned term. Where the Court does hold such adjourned term, it is to be deemed a part of the regular term; and every step may be taken at such adjourned term, that might have been taken at the regular term. Where the Court is continued from the regular to an adjourned term, the proceedings may be said to be *in fieri*, until the close of the adjourned term, and the records completely under the control of the Court.

Per Curiam.—We are of opinion that the appeal was properly taken, and that the motion must be overruled.

D. Mace, for the appellants.

H. W. Chase and J. A. Wilstach, for the appellee.

EMERSON v. JONES and Another.

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November 26.APPEAL from the *Tippecanoe* Common Pleas.*Per Curiam*.—Judgment by default. There was no effort to be relieved therefrom in the Court below.

The judgment is affirmed, with 5 per cent. damages and costs.

E. L. Greenlee, for the appellant.*J. E. McDonald* and *A. L. Roache*, for the appellees.

BUTLER and Others v. MYER.

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On December 22, 1857, *A.* recovered a judgment against the *Cincinnati and Chicago Railroad Company*, upon which he caused an execution to be issued, and levied upon certain real estate. *B.*, who was in possession of the land, filed his bill to enjoin the sale on the execution, alleging that on October 1, 1853, the railroad company, being then the owner of said land, conveyed the same, with other property, to trustees, in trust to convey the same in satisfaction of bonds of the company, as the company should direct; that on January 13, 1857, said trustees, by the direction of the company, conveyed the land to plaintiff's grantors, they having taken up, and surrendered to the company, her said bonds, to the amount of the appraised value of the lands. Answer: that the bonds of the company, mentioned in the complaint, were executed, by a corporation, under the authority of the State of *Indiana*, and were made payable in the State of *New York*, bearing interest at ten per cent.; that instruments bearing a higher rate than seven per cent., were void by the law of the State of *New York*, which was set out. Held, that as one of the trustees resided in *Ohio*, and the deed of trust was executed and acknowledged in that State, and recites that the bonds have been "this day" issued, &c., the inference is that the bonds were negotiated in that State; and there is nothing to show that such a rate of interest was illegal in that State.

Held, also, that the place of the delivery of a bond or note, and not the place where it is dated, or signed, is the place of its execution.

Held, also, that a contract made in one State, to be performed in another, is to be governed by the law of the place of performance, so that if a

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contract is illegal, on account of usury, by the law of the place where it is made, it may still be upheld by virtue of the law of the place of performance.

Quære : Whether a contract, valid by the law of the place where it is made, and where both parties reside, when sought to be enforced in the Courts of the State where it was made, will be held void because the law of the State in which the parties have fixed the place of performance would make it void.

Held, also, that if a conveyance be made to a third person, in satisfaction of illegal claims taken up by such third person, at the request of the grantor, such conveyance is upon a valid consideration; and, in this case, there was such a consideration, even if the bonds were void for usury.

Held, also, that there is no reason why corporations should not be bound by the same moral considerations that bind individuals.

Held, also, that if a debtor makes a conveyance of his land to his creditor in satisfaction of a usurious debt, the deed, being an absolute conveyance and not a mortgage, can not be avoided for the usury.

Tuesday,
November 26.

APPEAL from the *Wayne Circuit Court*.

PERKINS, J.—On *August 27*, 1857, one *William Butler* commenced suit against the *Cincinnati and Chicago Railroad Company*, and on *December, 22* following, obtained judgment in the suit for \$65,000. On *January 26*, next succeeding, *Butler* caused execution to be issued upon the judgment, which execution, sometime afterward, was levied upon a tract of land of which *Isaac Myer* was in possession, and claimed to be the owner.

Myer subsequently filed his complaint for an injunction, to restrain the sale of the land upon the execution. He alleged that said railroad company, on *October 1*, 1853, then being the owner, in fee simple, of the lands levied on, with others, conveyed them to *John McLean* and *Solomon Meredith*, in trust to convey the same in satisfaction of bonds theretofore issued by the company, as said company should direct, &c. He further alleged, that on *January 13*, 1857, said trustees, by the direction of the company, conveyed the lands in controversy in this suit, in fee simple, to *Lewis B. Morrison* and *Thomas Newby*, they having taken up, and surrendered to the company, her bonds, to the amount of the appraised value of the lands, viz., \$4,000. He further alleged, that afterward, on *March 21*,

1859, said *Morrison* and *Newby*, for a valuable consideration, conveyed the lands in fee simple to him, the plaintiff, *Myer*.

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The deeds above mentioned, including the trust deed, were all recorded in due time, and proper places.

The defendants answered that the bonds of the company, mentioned in the complaint, were executed by a company acting under the authority of the State of *Indiana*, and were made payable in *New York*, bearing interest at ten per cent.; that instruments bearing a higher rate of interest than seven per cent. were void by the law of *New York*, setting out the statute making them so.

A demurrer was sustained to the answer, and the sale of the land perpetually enjoined.

The defendants, *Butler* and others, appeal to this Court, and they here insist upon a reversal of the judgment below, on the ground that the railroad bonds mentioned, were void, and, hence, no consideration for the trust deed, or the deed of the trustees to *Morrison* and *Newby*.

We will examine this proposition, and should we come to the conclusion that the bonds were void, it will then be necessary for us to consider the further propositions, whether that fact made the deeds, given for their conveyance, without consideration; and if so, whether this latter fact renders void the title of *Myer*, if he must be taken to be a *bona fide* purchaser from *Morrison* and *Newby*.

The bonds are assumed to have been prepared in *Indiana*, and to have been made payable in *New York*, bearing ten per cent. interest, a greater rate than is allowed by law in either *Indiana* or *New York*; and, hence, it is insisted, the bonds are illegal by the laws of both States. In such case, it seems the ultimate fate of the illegal security is determined by the law of the place where it is executed. *Mir v. The Madison Insurance Co.*, 11 Ind. 117. By the law of *Indiana*, the bonds would only be void, on the ground of usury, to the extent of the interest. It is, however, objected, we may here observe, that no person except the maker of an usurious instrument, or another by his permission, can avail himself of the defense of usury. *Conwell v. Pimphrey*,

Nov. Term, 9 Ind. 135; *Stevens v. Muir*, 8 Ind. 352; *Wright v. Bundy*, 11
1861. Ind. 398. The heirs, representatives, and creditors of the

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maker of the usurious instrument, may do so. *Dix v. Van Wyck*, 2 Hill, (N. Y.) 522. We may also properly remark here, that it is claimed that if the bonds were usurious, they were void for another reason, viz., want of power in the corporation to issue them. It is claimed that there is a difference, in this respect, between the paper of a corporation and an individual; that a corporation has power, by its charter, to execute legal contracts only, and that such as are illegal, are therefore *ultra vires*, and void, on that ground. See Angel and Ames on Corp. 6 ed. p. 275, for the authorities on this point. *Billingsley v. The State Bank*, 3 Ind. 375, is also cited by counsel, *contra*. See, also, *The Evansville, &c. Co. v. The City of Evansville*, 15 Ind. 395. But are the bonds in question shown to be usurious? for if they are not, they are not shown to be illegal on either ground. If they are not usurious, they are not void as being *ultra vires*.

The record contains no copy of even a single one of the bonds. It does not state where they were issued, nor where they were negotiated, or intended to be negotiated; and it would seem that such place might determine the question of the validity of the bonds under the peculiar phraseology of our statute. See *Butler v. Edgerton*, 15 Ind. 20.

It is averred that the *Cincinnati and Chicago Railroad Company* was incorporated under the general law of *Indiana*, and from this fact alone, the presumption would arise, that the company acted in this State. See *Butler v. Edgerton*, 15 Ind. 15. But the further facts appear of record, that the deed of assignment was executed and acknowledged by the corporation in *Cincinnati, Ohio*, and that one of the trustees resided there. And as to the issuing of the bonds, the deed of trust recites as follows:

"Whereas, the party of the first part, in the lawful exercise of their corporate powers, are authorized to borrow the sum of one hundred thousand dollars; and whereas, they are now about to borrow the sum of one hundred thousand dollars, to be expended in the construction of their road, from the line dividing the States of *Ohio* and *Indiana*, to the

town of *New Castle*, in said State of *Indiana*, and to this end, have this day issued certain bonds, to the amount of one hundred thousand dollars, &c., payable at a certain bank in the city of *New York*, five years after date," &c.

This is said by the corporation, at *Cincinnati, Ohio*, while issuing the security for the satisfaction of the loan; and can any other inference be fairly drawn from the facts stated, in the absence of any thing showing the contrary, than that the bonds were issued and delivered, and the loan contracted for, was negotiated, in fact, in *Cincinnati, Ohio*? And, it is not material, even "on a question of usury, where the contract, note, or other security is dated, or signed; for the place where it is delivered, is the place of execution." Edwards on Bills and Notes, p. 182.

The bonds in question, then, may be taken, in now considering the case, as executed in *Ohio*, where it is not shown but that ten per cent. interest is allowed; and, in favor of the validity of the action of the corporation, we may so presume. Our statute expressly authorized the corporation to execute bonds, "at such rate of interest as is allowed by the laws of the State where the contract is made." *Butler v. Edgerton*, 15 Ind. 19. But the bonds, though legal where issued, were made payable in *New York*, where the rate of interest they bore was usurious; and the question is, did that fact render them void?

The general principle is well settled, that contracts made in one State, to be performed in another, are to be governed by the law of the place of performance; so that if the contracts are illegal, on account of usury, by the laws of the place where made, if to be performed there, still they will be upheld as legal, by virtue of the law of the different place of performance. *Andrews v. Pond*, 13 Pet. 65; *Jacks v. Nichols*, 1 Seld. 178; *Curtis' Digest*, p. 96; *Butler v. Edgerton*, 15 Ind. 15; *Hyde v. Goodnow*, 3 Comst. 266. See this latter case for an exception to the rule. Also, *The Commonwealth of Kentucky v. Bassford*, 6 Hill, (N. Y.) 526. But can it also be laid down as a general principle, that contracts valid in the State where made, and where both parties to them reside, and when sought to be enforced in the

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Courts of such State, will be held void, because the law of the State in which the parties had fixed the place of performance, would make them so? Or will the rule change, where it may be necessary to uphold the contract? On this point, the authorities involve a palpable antinomy, which we may state, but shall not remove.

Contracts on which interest is recoverable, are of two general classes, viz., those which stipulate a rate of interest, and those which do not. In relation to this latter class, it seems to be generally agreed that the law of the place of performance will govern the Courts, as to the rate of interest to be allowed. See *Hunt v. Standart*, 15 Ind. 33. In regard to the former class, the Supreme Court of *Louisiana*, in *Depra v. Humphreys*, 4 Cond. La. Rep. 403, held that interest might be expressly stipulated for, according to the law of the place where the contract was made, or of that where it was to be performed, and that the express stipulation would be enforced in all Courts. This doctrine is expressly sanctioned in *Chapman v. Robertson*, 6 Paige, (N. Y.) 627. See, also, *Hanrich v. Andrews*, 9 Porter, 9, cited in Byles on Bills, 3d Am. Ed. p. 448, note; *Allen v. Schenckhardt*, Am. L. Reg. (N. S.) vol. 1. p. 13.

Judge *Story* combats the correctness of the decisions in the *Louisiana* and *New York* cases, (*Story's Conflict of Laws*, § 298, *et seq.*) and attempts to show them unsupported by the current of authority.

Another proposition has been held in some of the Courts, viz., that a note or bond for the payment of money may be governed by the law of one State, where it is made payable, and the mortgage upon land to secure the payment of such note or bond, be governed by the law of another, where the land is situate, and the mortgage must be foreclosed. This, if we rightly understand *Chapman v. Robertson*, *supra*, is the decision in that case; but Judge *Story* does not approve of the decision in that case, upon this point. *Conflict of Laws*, § § 293 b, and 293 c.

We shall stand upon none of the above grounds, in deciding the case at bar, and, hence, shall express no opinion as to their legal strength.

There are two other grounds of undoubted solidity, upon which we prefer to rest the present decision :

1. If a conveyance be made by the grantor to a third person, in satisfaction of illegal claims taken up by such third person, at the request of the grantor, such conveyance is upon a valid consideration. *Wright v. Hughes*, 13 Ind. 109; *Butler v. Edgerton*, 15 *id.* 15.

Such was the consideration in this case, (supposing the bonds to have been usurious) of the deed from the corporation, through the trustees, to *Morrison and Newby*.

If it be objected that the contracts, in the cases cited, were between individuals, and that the same rule should not apply to corporations, we answer, that we can see no reason why corporations should not be bound by the same moral considerations that bind individuals. It has been intimated that an administrator, acting as he does in a trust capacity, is not bound, in behalf of the estate, to set up such technical defenses as the statute of limitations, &c. See *Riser v. Snoddy*, 7 Ind. 442.

But if it be conceded that the directors, without the consent of the stockholders, would be unable to bind the corporation by such conveyance, surely they could with such consent. In this case, such consent is clearly inferable from the acquiescence of the stockholders in the deed of trust, without objection, since 1853. *Smead v. The Indianapolis, &c. Co.*, 11 Ind. 104.

2. If a debtor makes a conveyance of his land to his creditor in satisfaction of a usurious debt, the deed, being an absolute conveyance, and not a mortgage, can not be avoided for the usury. *Denn v. Dodd*, 1 John. Cas. 158. This case is directly in point, and is recognized as law in *Dix v. Van Wyck*, 2 Hill, (N. Y.) 522, in which case, *Pratt v. Adams*, 7 Paige, 615, is also cited as supporting the proposition. And see *Bissell v. The Michigan, &c. Railroad Co.*, 22 N. Y. Court of Appeals, 258; and *Parish v. Wheeler*, *id.* 494. The case at bar falls directly within the above principle. The corporation had power to convey real estate, and so had the trustees, and the legal title passed by the conveyance of each. It is not necessary, therefore, that we should inquire

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Nov. Term, whether *Myer* would not be protected, at all events, as a
1861. *bona fide* purchaser. Hill on Trustees, p. 504.

JONES *Per Curiam*.—The judgment is affirmed, with costs.
v. *J. B. Julian and Thomas A. Hendricks*, for the appellant.
GREGG. *Nim. H. Johnson*, for the appellee.

JONES v. GREGG.

Suit by *A.* against *B.*, to recover the value of certain lumber, alleged to have been furnished to him under a contract that he was to work it up into sash, &c., and pay to *A.* the usual price of such manufactured articles, deducting the cost of manufacturing, and which *B.* was alleged to have wasted, and destroyed, and converted to his own use.

Held, that *A.* might waive the tortious conversion of the property, and sue in form *ex contractu*.

Held, also, that as the evidence is not in the record, this Court cannot say that the Court below erred in permitting the plaintiff, after the evidence had closed, to amend his complaint by inserting an averment of a demand, before suit brought.

Held, also, that as the lumber was in the possession of *B.*, only as the agent of *A.*, such portion of it as was not worked up continued to be the property of *A.*, and he could not maintain an action for it, without a previous demand upon *B.*

Wednesday,
November 27.

APPEAL from the *Wayne* Common Pleas.

DAVISON, J.—*Gregg* was the plaintiff, and *Jones* the defendant, below. The complaint charges: 1. That the defendant, on *January 2*, 1858, was indebted to one *Caleb B. Jackson*, \$910, for lumber sold, and for money had and received, and that afterward, on *February 6*, then next following, *Jackson* assigned his account against the defendant for the lumber, and for the money, to the plaintiff. 2. That on *January 3*, 1858, the defendant was further indebted to *Jackson*, \$910, for 5,200 feet of lumber belonging to him, which defendant had sold and otherwise disposed of, and appropriated the proceeds thereof to his own use, and that, afterward, *Jackson* sold and assigned his account, against

the defendant, for the lumber so disposed of, &c., to the plaintiff. Proper issues having been made, the cause was submitted to a jury, who found for the plaintiff. But the Court, on the defendant's motion, granted a new trial; and, thereupon, the plaintiff, by leave, &c., amended his complaint as follows:

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That in *March*, 1856, *Jackson* employed the defendant to sell 5,200 feet of lumber, of which the defendant took charge as *Jackson's* agent; that in the spring and summer of that year, as such agent, he sold a portion of the lumber, to the value of \$45, which he paid to *Jackson*;—and that in *November*, 1856, he made a new contract with *Jackson*, to the effect that the lumber remaining unsold was to be hauled to the defendant's mill, by him, and at his expense, and, in consideration therefor, he was to have the advantage of working it up into sash, blinds, flooring, &c.; that defendant was to work up the lumber at *Richmond* prices, by the spring of 1857, and pay for it by that time, first deducting the cost of working it up, according to *Richmond* prices, and paying the rates which lumber, so worked up, sold for, according to such prices, at that date. It is averred that the defendant took charge of the lumber, with a view to the execution of the contract; but failed to comply with the same, and wasted and destroyed the lumber, and converted it to his own use. And that although often requested by *Jackson* to account for the lumber, in accordance with the contract, he has all times refused, &c.; and that afterward, &c., *Jackson* assigned this claim against the defendant to the plaintiff, for value received, &c. The defendant demurred to the complaint, thus amended, on the ground "that it did not state facts sufficient to constitute a cause of action;" but his demurrer was overruled, and he excepted.

There is nothing in this exception. The charge in the amended complaint is, that the defendant, the lumber being in his hands, under a contract to work it up, &c., "wasted and destroyed it, and converted it to his own use." This, it is true, charges a tortious disposal of the property; but the rule is, that a party may, in cases of this sort, waive the tort, and sue in form *ex contractu*. *Cooper v. Helsabeck*, 5 Blackf.

Nov. Term, 1861. 14; *Patterson v. Crawford*, 12 Ind. 241. And this being the case, it will at once be seen, that the original and amended

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complaint are plainly consistent with each other.

The defendant answered the complaint, as amended, by a general traverse; and thereupon the issues were submitted to a jury. Verdict for the plaintiff. Motion for a new trial denied, and judgment, &c. The record shows that while the trial was in progress, and after the evidence had been closed, the plaintiff moved to amend his amended complaint by inserting therein, at the proper place, these words: "and that said *Jackson*, on the 1st of *October*, 1857, demanded of said defendant an account and settlement for said lumber." This amendment, though resisted by the defendant, was allowed by the Court, and the defendant noted an exception. Section 99, of the Practice Act says, "that the Court may, at any time, in its *discretion*, and on such terms as may be deemed proper, direct any material allegation to be inserted, struck out, or modified, to conform the pleadings to the facts proved, when the amendment does not, substantially, change the claim or defense." 2 R. S., p. 43. As the record does not profess to contain the evidence given in the cause, we are unable to say whether the allowed amendment was, or not, required, "to conform the pleadings to the facts proved." Hence it must intend, that the action of the Court, in allowing it, was the exercise of a sound discretion. And it must be conceded that the amendment, as allowed, in no respect changed "the claim or defense."

There is, in the record, a bill of exceptions which says, that upon the trial, there was evidence tending to show that "several thousand feet of the lumber in controversy, were not used by any one, and were still on hand; that *Jones* contracted with *Jackson* to work up the lumber, and had good opportunities, in advance, of knowing its qualities, and that it was such as could not be worked," &c.

In reference to this evidence, the defendant moved the following charges, which the Court refused:

"1. If *Jones* agreed with *Jackson* to work the lumber in contest into sash, blinds, doors, &c., and after working part of it, he refused to work the balance, such balance is the

property of *Jackson*, or his assigns, and the plaintiff can not recover for it against *Jones*, unless he has demanded it of him, and he has refused to give it up." Nov. Term,
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"2. If *Jones* agreed with *Jackson* to work up the lumber into blinds, sash, &c., and refused to do it because the lumber was not fit for the purpose, but used and sold some of it, he is responsible for the fair price of what he used, and what he got for that which he sold, and this is the measure of damages."

These instructions, taken together, should have been given. The lumber being in the hands of the defendant as the mere employee of *Jackson*, the property in it remained in the latter; and, in consequence, that which was not worked up continued his property. But, as we understand the instruction, the defendant's possession of the lumber was acquired in good faith, and the result is, an action against him for any portion of it, cannot be maintained until after demand and refusal. Under the facts, so far as they are shown in the bill of exceptions, the measure of damages is correctly stated. We are of opinion that the Court, in refusing the charges moved by the defendant, committed an error.

Per Curiam.—The judgment is reversed, with costs. Cause remanded, &c.

J. B. Julian, for the appellant.

ADAMS and Others v. DREXEL and Others.

APPEAL from the *Marion* Circuit Court.

*Wednesday,
November 27.*

Per Curiam.—The appellees, who were the plaintiffs, sued the appellants, who were the defendants, upon two promissory notes, one for the payment of \$173, and the other for \$215. The notes were payable to *W. W. & H. Smith*, and by them indorsed to the plaintiffs. The record shows that process was duly served on the defendants, and

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v.
MILLER.

having failed to appear, they were defaulted, and judgment by default regularly entered against them. No motion to set aside the default appears to have been made in the lower Court; hence, the errors assigned in this Court are not available.

The judgment is affirmed, with 5 per cent. damages and costs.

K. Ferguson, for the appellants.

F. Rand, for the appellees.

HUNTER and Others v. MILLER and Another.

An appeal will lie to the Supreme Court from an order of sale, in a proceeding for the partition of lands, made on report of the commissioners that the land is not susceptible of division.

In a proceeding for partition of lands, instituted by persons claiming to be entitled by descent, against others, some of whom claim to hold as tenants in common with the plaintiffs, by descent from a common grantor, and others of whom claim, by purchase from the ancestor, an adverse and exclusive title to the whole property, the former class of defendants are not competent witnesses for the plaintiffs, to prove that the deed, under which their co-defendants claim an exclusive title, was obtained by fraud, or that the grantor was insane.

Wednesday,
November 27.

APPEAL from the *Warren* Circuit Court.

HANNA, J.—The appellees applied for partition of certain described lands, averring that the female plaintiff was the daughter of one *James Hunter*, and that certain persons, named as defendants, were also sons and daughters of said *James*, entitled to equal shares with said plaintiffs, of the said lands of which he died seized. Part of the defendants were defaulted, the others answered, denying that said *James* died seized of said lands, and averring that before his death he had disposed of the same. Reply, that said conveyances of said lands were obtained by undue means, and that decedent was not possessed of a disposing mind, &c.

The evidence shows that decedent had two sets of children,

three by the first, and nine by the second wife. The disposition made, and relied on, was for the benefit of the younger, to the exclusion of the elder, set of children. One of the latter instituted these proceedings, and introduced her full brother and sister as witnesses, upon all the issues. General verdict for the plaintiffs, and judgment that there should be partition; from which an appeal was taken to this Court, and dismissed. 11 Ind. 356. Commissioners were appointed, who reported that partition could not be made without injury, &c. The Court, thereupon, ordered and adjudged that the land should be sold, &c., from which order this appeal is taken.

Nov. Term,
1861.

HUNTER
v.
MILLER.

The points presented are, first, by the appellees, that the appeal should be dismissed, because no final judgment was rendered, from which an appeal would lie, relying upon the decision in this case, *supra*. We have a direct statute authorizing an appeal from an interlocutory order for the sale of lands. 2 R. S. We do not see but that it applies to this class of judgments of sale.

The next point made is by the appellants, to wit: that the defendants who were defaulted, and who claim title by inheritance, were permitted to testify against the title of their co-defendants, who claim by purchase. The evidence was permitted, under that section of the statute which permits a party to introduce the adverse party as a witness. The principle involved here was decided in *Swift v. Ellsworth*, 10 Ind. 205. The witnesses, though named as defendants, were not adverse parties, in the sense contemplated by the framers of this statute; but had the same interest to sustain that the plaintiff had, namely, title by inheritance from said *James*; while their co-defendants were attempting to establish a title that would defeat that inheritance, and to the destruction of that title the evidence of these witnesses was directed. We do not think they were competent witnesses for that purpose.

Per Curiam.—The judgment is reversed, with costs. Cause remanded, &c.

Gregory & Harper, and *W. C. Wilson*, for the appellants.
Bryant & Chandler, and *D. Mace*, for the appellees.

Nov. Term,
1861.

CONNER and Others v. COMSTOCK and Others.

17 90
167 532
167 533

CONNER
v.
COMSTOCK.

It is not necessary that the answer of the defendant in replevin should claim a return of the property; but if the case made by the evidence, authorizes a return, it may be awarded by the Court, after verdict.

A judgment of return can not be awarded, where the evidence fails to show that the property was delivered to the plaintiff in replevin, or, where there has been a failure to assess the value of the property.

A. and B. entered into a written contract, whereby the former agreed to purchase of the latter a stock of merchandise, then in store, at the cost price thereof. A. was to take up certain notes given by B. to divers persons, at a rate not exceeding what the stock would pay if distributed among them and A., according to the amount of their several claims against B.; or, if such an arrangement could not be made with the creditors, then A. was to give B. his note, for such an amount as would have been coming to the creditors if they had accepted the arrangement. Possession of the goods was given to A., the day following the execution of the agreement.

Held, that the contract was not an agreement to sell, merely, but an actual sale, upon a consideration to be performed at a future day.

An action of replevin will not lie to recover the possession of goods from one who has purchased them in good faith, of a wrong doer, without a previous demand by the true owner.

Wednesday,
November 27.

APPEAL from the *Marion* Circuit Court.

DAVISON, J.—This was an action of replevin, by the appellants, who were the plaintiffs, against the appellees, to recover certain store goods, consisting of boots and shoes. The complaint is in the form prescribed by the statute, charging possession without right, and unlawful detention, &c. Defendants answered by two paragraphs: 1. The property was not in the plaintiffs. 2. That it belonged to the defendants, "*W. H. Comstock & Co.*" Upon these defenses, issues were made and submitted to the Court, who found that the defendants did not unlawfully take, or detain, the property; that the same be returned to the defendants; and that they had sustained damage to the amount of one dollar. Judgment was rendered in accordance with the finding of the Court. At the proper time, the plaintiffs moved for a new trial, on the ground that "the decision was not sustained by the evidence, and was contrary to law." But the motion was overruled, and they excepted.

The evidence given on the trial is, substantially, as follows: On *January 20, 1858*, the plaintiffs, and *James Serrin*, entered into a written contract, whereby the plaintiffs agreed to purchase said *Serrin's* stock of boots and shoes, then in his store room in *Indianapolis*; the same being then held by the sheriff, by virtue of a writ of attachment sued out by these plaintiffs, which was then pending in the *Marion Circuit Court*. Plaintiffs agreed to take the property at the price it cost *Serrin*, its value to be ascertained by reference to an appraisement made by the sheriff, when he levied the attachment. They also agreed to take up certain notes made by *Serrin* to *W. H. Comstock & Co.*, and *Benedict, Hall & Co.*, at a rate not exceeding what the same stock would pay at its value as above, if distributed among them and the plaintiffs, on account of *Serrin's* indebtedness to said plaintiffs; and they, the plaintiffs, were to deliver up to *Serrin* the notes held by *Comstock & Co.*, and *Benedict, Hall & Co.*, and the amount it cost them was to be deducted from the value of the goods, as above ascertained; and for their value remaining after such deduction, the plaintiffs agreed to deliver to *Serrin* double the amount of the notes held by them, against him. It was further agreed, that if the plaintiffs could not make an arrangement, immediately, with *Comstock & Co.*, they were to execute their notes to *Serrin* for an amount equal to what they, *Comstock & Co.*, would have received under such arrangement; and it was further agreed that said attachment suit be dismissed, each party paying half the costs, &c.

This contract, as has been seen, was made *July 20, 1858*, and the proof is, that it was executed at 11 o'clock of that day. The goods sold to the plaintiffs, those which were in the custody of the sheriff upon the attachment, and those now in suit, are the same goods. The plaintiffs were to get the key of the store room in which the goods were situate, and take possession of them next morning. A written instrument, directing the dismissal of the attachment suit, was delivered to the clerk of said Court on the day of sale, and that suit was accordingly dismissed. In the morning after the sale, the plaintiffs called on the sheriff for the key of the

Nov. Term,
1861.

COMMER
V.
COMSTOCK.

Nov. Term, store room, when they met *Serrin*, who informed them, that
1861. after the sale to them, he had sold the same goods to *W. H.*

CONNER
v.
COMSTOCK.

Comstock & Co. This sale appears to have been made in the evening of the same day on which the plaintiffs contracted with *Serrin*. It was also witnessed by a written contract between him and *Comstock & Co.*, which stipulated, in substance, that he, *Serrin*, had, at that date, sold the goods to *Comstock & Co.*, at their fair cost value; the price to be fixed by two appraisers, to be chosen by the parties; when appraised, *Comstock & Co.* were to retain out of the same, the amount of their note against *Serrin*, calling for \$468, also to pay *Benedict, Hall & Co.*, \$444, and *W. H. McDonald*, \$450, and pay the balance to *Serrin*; but they were not to be liable to pay his indebtedness, or pay any overplus to him, until the money was realized from the sale of the goods. They were, however, to use reasonable diligence to make such sale, reserving the right to sell on a reasonable credit, taking the notes of the purchasers for the overplus, after the above named debts were paid.

McNaught, a witness for the defense, testified that *Henderson*, the agent of *Comstock & Co.*, gave him the key of the store room, and employed him to sell the goods; the key was given to him in the morning, next after the sale to *Comstock & Co.* He had been in the store about an hour, when the sheriff took the goods, by virtue of the writ of replevin issued in this suit.

Henderson, the agent, testified that the contract between *Serrin* and *Comstock & Co.*, was made in witness' office, about 7 o'clock of the evening of *January 20*, 1858; that he had no notice of the sale to *Conner, Burton & Worman*, the plaintiffs; on the contrary, he was informed there had been no sale; heard there had been some negotiations, but was informed that no sale had been consummated. Attachment proceedings were then pending in the *Marion Circuit Court*, in favor of *Comstock & Co.*, which, on the same evening, after the sale, were ordered by witness to be dismissed.

This judgment, so far as it awards a return of the property, is said to be erroneous, because the defendants, in their pleading, did not claim a return. This position seems to be

untenable. If the case made by the evidence authorizes a return, it may, after verdict, be awarded by the Court, on motion of the defendant. *Plant v. Crane*, 7 Ind. 486. There is, however, another ground upon which the action of the Court, in awarding the return, must be held objectionable, viz., the evidence fails to show that the goods were delivered to the plaintiffs. The only witness who testifies on the point of delivery, is *McNaught*, and he simply states that "he had been in the store about an hour, when the sheriff took the goods, by virtue of a writ issued in this case." Now, this may prove that the sheriff seized the property, but falls short of proving it in possession of the plaintiffs. The sheriff, before he delivers the property seized to a replevin plaintiff, is required by the statute "to take from him a written undertaking, payable to the defendant, &c., to the effect that he will prosecute his action with effect, and without delay, &c.; which undertaking shall be delivered to the sheriff within twenty-four hours after seizing the property; and in default thereof, it shall be returned to the defendant." 2 R. S., § 132, p. 57. For aught that appears in the record, the goods, in this instance, may have been so returned. At all events, there is no evidence tending to prove that they were ever in the possession of the plaintiffs; and the result is, the judgment awarding a return must be held erroneous. Again, the value of the property does not appear to have been assessed, and for that reason, a return should not have been awarded. *Tardy v. Howard*, 12 Ind. 404. The property never having been detained by the plaintiffs, the judgment for damages is not maintainable.

The remaining inquiry relates to the sufficiency of the evidence to sustain the finding of the Court. It is argued, that the sale to the plaintiffs vested the property in them, without any formal delivery, because it was by contract in writing, "signed by the party to be charged," &c. 1 R. S., § 7, p. 301. While, on the other hand, it is insisted that the contract was a mere agreement to sell, and shows that certain things were to be done by the plaintiffs, before their purchase was complete. The latter position, it seems to us,

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1861.

CONNOR
V.
COMSTOCK.

Nov. Term, 1861.
 CONNER
 v.
 COMSTOCK.

is incorrect. The purposes of the contract at once show, that it was intended by the parties, not as an agreement to sell, merely, but as an actual sale, upon a consideration to be performed at a future day. The subject of the sale is sufficiently described; its price is fixed by reference to a definite standard, and the mode of payment is plainly stipulated. And, beside this, there was a *memorandum in writing* of the contract of sale, which, under the statute of frauds, was alone, in this instance, sufficient to invest the plaintiffs, not only with the title to the property, but also the right of possession. The result is, *Serrin*, the vendor, having by the sale to the plaintiffs divested himself of all right of property in the goods, could not by his subsequent sale to *Comstock & Co.*, pass to them a valid title; because, having no title, he could confer none. 1 Parsons on Cont. 240; 1 Smith's Lead. Cases, 258; 11 Wend. 80; 2 Parsons, 336, *et seq.*

But the appellees assume this ground: they say, although *Comstock & Co.* may not have a perfect title to the property, still, they purchased without notice of the contract under which the plaintiffs claim; that so far as they had concern in the transaction, the sale to them was *bona fide*, and having, in virtue of it, acquired possession of the goods, they are not liable to be sued, until after a demand of the property, and a refusal to deliver it to the true owner. This objection to the sufficiency of the evidence, is well taken. *Wood v. Cohen*, 6 Ind. 455, decides, "That the owner of a chattel can not maintain an action to recover the possession, against one who has purchased it from a wrongful taker, until he has made a demand for its return." See, also, *Barrett v. Warren*, 3 Hill, 348; *Pringle v. Phillips*, 5 Sandf. 157. The principle involved in these decisions, obviously applies to the case at bar. Here, the evidence proves the purchase of *Comstock & Co.* to have been made in good faith; and no demand having been made of them for the delivery of the goods, prior to the institution of the suit, the action can not be maintained.

Per Curiam.—The judgment, so far as it awards a return of the property, and damages for the detention, &c., is

reversed; in all else, the judgment is affirmed, with costs, in this Court, against the appellees.

N. B. Taylor, for the appellants.

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1861.

Downs
v.
Downs.

Downs and Others v. Downs.

Where an amended complaint has been filed, the original complaint should not be included in a transcript of the record, on appeal.

A recital, in a bill of exceptions, that "this was all the *testimony* given in the cause," is not within rule 30 of this Court; the word "*testimony*," not being synonymous with "*evidence*."

When the widow of a decedent has obtained an order of the proper Court, vesting the estate of her deceased husband in her, the same being appraised at less than \$300, she is entitled to sue for, and recover, all debts due the decedent, and to the possession of all property belonging to such estate; and it is not material that the assets, in fact, exceed \$300 in value, so long as the order of the Court remains in force.

APPEAL from the *Sullivan* Common Pleas.

Wednesday,
November 27.

WORDEN, J.—Action by the appellee, against the appellants. Issue; trial by jury; verdict and judgment for the plaintiff, for \$130.

The appellants assign errors, among other things, upon various rulings of the Court upon demurrers. The record, as well as being somewhat confused, is voluminous, and contains much matter that is improperly here. There were various pleadings filed, including several amended complaints, the Court holding, on demurrers to the answers, that the several complaints were bad. Finally, an amended complaint was filed, which alone stated the plaintiff's cause of action, and formed the basis of her recovery. To this complaint, as we understand the record, no demurrer was filed, nor any other pleadings, except the general denial. Hence, no question arising on the pleadings is presented for decision. The several pleadings, previous to the last amended complaint, should not have been included in the transcript. Code, § 559. But as the judgment will have to

Nov. Term, he affirmed at the appellants' costs, we shall make no order
1861. in respect to the costs of the transcript.

Downs

v.

Downs.

The defendant moved for a new trial, for five several reasons, the first, second and fifth of which, relate to the sufficiency of the evidence to sustain the verdict. The third was, that the Court erred in giving instructions, and the fourth, that the Court erred in refusing to instruct as asked.

The evidence is not all in the record; hence, no question arises as to the sufficiency thereof. A bill of exceptions, after setting out certain evidence, states that it was all the "testimony," &c. This is not in compliance with the 30th rule. It has been held in several cases, that "testimony," is not synonymous with "evidence."

We do not find that any exceptions were taken to instructions given by the Court.

The instruction asked, and refused, is as follows, viz., "If the plaintiff has not proved that the property set forth in her inventory has increased in value, since said inventory was made, but if it appears from the evidence that the interest she claimed in the mill, as set forth in the declaration, was worth as much when the inventory was made, as it is now, then the plaintiff is estopped, and can not recover more than will make up the amount of her inventory to \$300."

In order to understand the relevancy of this instruction, it may be stated that the plaintiff is the widow of *John Downs*, deceased. That after the death of her husband, she instituted proceedings in the proper Court to have his property delivered over to her, the same not amounting to \$300 in value; which, after due inventory and appraisement of the property, amounting to \$265.07, was ordered by the Court. This suit is brought against the defendants, alleging that the deceased had an interest, as a partner with the defendants, in a certain saw and grist mill, &c. The interest of the deceased in the mill property was inventoried, and appraised at \$40.

It is claimed by the appellants, that the widow could only recover enough, in addition to any increased value of the

claim sued upon, to make up, with what she had already received, her \$300. Nov. Term, 1861.

The statute makes ample provision for any creditor, heir, or legatee of the deceased to appear, before the order for the delivery of the property to the widow shall be made, and show that the property has been improperly valued, or that there was property not embraced in the inventory, and have a re-appraisal, and such order as may be right in the premises. 2 R. S. 1852, § 135, p. 279. Whether the order, after having been made, could be set aside on a proper showing, and administration granted, is a question upon which we need express no opinion. Until such order is set aside, it enables the widow "to sue for and recover all debts due the decedent, and to the possession of any property belonging to such estate." *Id.* § 136. In our opinion, it is not material that the property, or the claims so ordered to be delivered to the widow, may exceed, in point of fact, the appraised value, or \$300. She is entitled to recover whatever there may be of property or debts, by virtue of the order of the Court, and that right can not be taken from her, except by setting aside the order.

The instruction asked was correctly refused.

We have thus noticed all the points that arise in the record, and find no error for which the judgment should be reversed.

Per Curiam.—The judgment is affirmed, with 5 per cent. damages and costs.

Scott, Neff and Gunn, for the appellants.

S. Coulson, for the appellee.

HACKER
v.
BLAKE.

17	97
136	614
17	97
144	582

HACKER v. BLAKE and Another, Administrators of BUTCHER.

Where a deed is made and accepted, and possession taken under it, want of title in the vendor will not enable the purchaser to resist the payment of the purchase money, or recover more than nominal damages on the

Nov. Term, covenants of the deed, while he retains the deed, and possession of the
 1861. land, and has been subjected to no inconvenience or expense.

HACKER

v.

BLAKE.

An entire want of title in the grantor, is a breach of a covenant of seizin, but while the purchaser retains possession, he can only recover nominal damages; and for such damages, a cause will not be reversed in the Supreme Court.

Wednesday,
 November 27.

APPEAL from the *Putnam* Circuit Court.

WORDEN, J.—Action by the appellant, against the appellees. Demurrer to the complaint sustained, and final judgment for the appellees. The plaintiff appeals, and brings in review the decision upon the demurrer. The substance of the case made by the complaint, is as follows:

In the lifetime of *William C. Butcher*, deceased, the plaintiff purchased of him certain lands, in the complaint described, and took a conveyance therefor, with covenants of seizin and warranty; and, at the same time, executed to the deceased a mortgage to secure the purchase money. The plaintiff took, and retains, possession of the premises. After the death of *Butcher*, his administrators filed a complaint in the proper Court, and obtained a judgment, foreclosing the mortgage, and directing a sale of the premises. An execution had been issued on the judgment, and levied upon the premises, which were about to be sold by virtue thereof. After the judgment, the plaintiff discovered that the deceased had no title whatever to a portion of the lands, he having purchased the same at a sheriff's sale, upon an execution issued upon a void judgment. Prayer, that proceedings on the execution be stayed; that a new trial may be had in the foreclosure suit, and the plaintiff permitted to make defense, and for other relief.

Passing by any questions of negligence, or diligence, in not discovering the defect in the title until after the judgment of foreclosure, we may treat the case as if the facts were pleaded in defense of that suit, or as if the plaintiff had brought an original suit upon the covenants in his deed. The plaintiff has not been evicted, but retains possession, and also the deed. In *Sna'lt v. Reeves*, 14 Ind. 164, it was held that "where a deed is made and accepted, and possession taken under it, want of title will not enable the

purchaser to resist the payment of the purchase money, or recover more than nominal damages on his covenants, while he retains the deed, and possession, and has been subjected to no inconvenience or expense, on account of the defect of title. This is, in many of the cases, because the purchaser's possession, being under the color of title, may continue undisturbed for twenty years, and thus become perfect, and he be uninjured. And he may rely on the covenants in his deed for redress, if injury occurs." The complaint, tested by the rules of law, as thus expounded, is clearly bad. *Vide*, also, *Laughery v. McLean*, *id.* 106. The entire want of title was a breach of the covenant of seizin, but for such breach, while the purchaser retains possession, he can only recover nominal damages; and for such damages, a judgment will not be reversed. *Tate v. Booe et al.*, 9 Ind. 13.

Per Curiam.—The judgment below is affirmed, with costs.

J. A. Matson and *James A. Scott*, for the appellant.

H. Secrest and *S. Turman*, for the appellees.

Nov. Term,
1861.

SWAIN
v.
MORBERLY.

SWAIN and Another v. MORBERLY.

17	97
148	134

A person purchasing of a commissioner appointed to sell real estate, in proceedings for partition, is not entitled to a deed under the statute, until the purchase money has been paid.

A., as commissioner, &c., executed to *B.* a certificate, as follows: "I do certify that *B.* has purchased the following real estate, (describing it,) for the price of, &c., for which he has given his notes with security, and that he is entitled to a deed for the same when this sale is confirmed by the Court." The sale was confirmed by the Court, and without making a deed, *A.* used for the purchase money.

Held, that the certificate did not purport to be a contract, binding upon *A.*, and did not bind him to cause a deed to be made, but simply certified that the purchaser would be entitled to a deed, if the sale was confirmed;

Nov. Term,
1861.

CONNER and Others v. COMSTOCK and Others.

CONNER
v.
COMSTOCK.

It is not necessary that the answer of the defendant in replevin should claim a return of the property; but if the case made by the evidence, authorizes a return, it may be awarded by the Court, after verdict.

A judgment of return can not be awarded, where the evidence fails to show that the property was delivered to the plaintiff in replevin, or, where there has been a failure to assess the value of the property.

A. and B. entered into a written contract, whereby the former agreed to purchase of the latter a stock of merchandise, then in store, at the cost price thereof. A. was to take up certain notes given by B. to divers persons, at a rate not exceeding what the stock would pay if distributed among them and A., according to the amount of their several claims against B.; or, if such an arrangement could not be made with the creditors, then A. was to give B. his note, for such an amount as would have been coming to the creditors if they had accepted the arrangement. Possession of the goods was given to A., the day following the execution of the agreement.

Held, that the contract was not an agreement to sell, merely, but an actual sale, upon a consideration to be performed at a future day.

An action of replevin will not lie to recover the possession of goods from one who has purchased them in good faith, of a wrong doer, without a previous demand by the true owner.

Wednesday,
November 27.

APPEAL from the *Marion* Circuit Court.

DAVISON, J.—This was an action of replevin, by the appellants, who were the plaintiffs, against the appellees, to recover certain store goods, consisting of boots and shoes. The complaint is in the form prescribed by the statute, charging possession without right, and unlawful detention, &c. Defendants answered by two paragraphs: 1. The property was not in the plaintiffs. 2. That it belonged to the defendants, "*W. H. Comstock & Co.*" Upon these defenses, issues were made and submitted to the Court, who found that the defendants did not unlawfully take, or detain, the property; that the same be returned to the defendants; and that they had sustained damage to the amount of one dollar. Judgment was rendered in accordance with the finding of the Court. At the proper time, the plaintiffs moved for a new trial, on the ground that "the decision was not sustained by the evidence, and was contrary to law." But the motion was overruled, and they excepted.

The evidence given on the trial is, substantially, as follows: On *January 20, 1858*, the plaintiffs, and *James Serrin*, entered into a written contract, whereby the plaintiffs agreed to purchase said *Serrin's* stock of boots and shoes, then in his store room in *Indianapolis*; the same being then held by the sheriff, by virtue of a writ of attachment sued out by these plaintiffs, which was then pending in the *Marion Circuit Court*. Plaintiffs agreed to take the property at the price it cost *Serrin*, its value to be ascertained by reference to an appraisement made by the sheriff, when he levied the attachment. They also agreed to take up certain notes made by *Serrin* to *W. H. Comstock & Co.*, and *Benedict, Hall & Co.*, at a rate not exceeding what the same stock would pay at its value as above, if distributed among them and the plaintiffs, on account of *Serrin's* indebtedness to said plaintiffs; and they, the plaintiffs, were to deliver up to *Serrin* the notes held by *Comstock & Co.*, and *Benedict, Hall & Co.*, and the amount it cost them was to be deducted from the value of the goods, as above ascertained; and for their value remaining after such deduction, the plaintiffs agreed to deliver to *Serrin* double the amount of the notes held by them, against him. It was further agreed, that if the plaintiffs could not make an arrangement, immediately, with *Comstock & Co.*, they were to execute their notes to *Serrin* for an amount equal to what they, *Comstock & Co.*, would have received under such arrangement; and it was further agreed that said attachment suit be dismissed, each party paying half the costs, &c.

This contract, as has been seen, was made *July 20, 1858*, and the proof is, that it was executed at 11 o'clock of that day. The goods sold to the plaintiffs, those which were in the custody of the sheriff upon the attachment, and those now in suit, are the same goods. The plaintiffs were to get the key of the store room in which the goods were situate, and take possession of them next morning. A written instrument, directing the dismissal of the attachment suit, was delivered to the clerk of said Court on the day of sale, and that suit was accordingly dismissed. In the morning after the sale, the plaintiffs called on the sheriff for the key of the

Nov. Term,
1861.

CONNOR
V.
COMSTOCK.

Nov. Term, cause of action, while, at most, they could only be a bar to
1861. a part.

THE EVANSVILLE, & C. RAILROAD Co. *Per Curiam*.—The judgment is affirmed, with costs, and
2 per cent damages.
v. *L. Sexton*, for the appellant.
HIATT *Davis, Wright & Green*, for the appellee.

THE EVANSVILLE AND CRAWFORDSVILLE RAILROAD COMPANY v.
HIATT.

On August 29, 1856, a locomotive and train of gravel cars were standing, temporarily, on the railroad track, at a station on the line of said road; and about the time the train started to back down the road, two persons, a father and son, started to come up toward the station on the railroad track, from a mill, a short distance below. As the train approached them, the son stepped off the track, but perceiving that his father was still on the track, and in the way of the advancing train, the son stepped back, and took him off the track, but was not able, himself, to avoid the train, but received an injury, resulting in the loss of his leg. The train was not moving faster than four miles per hour, and the persons managing the train, when they perceived that both persons did not leave the track, reversed the engine, and made every effort to stop the train.

Held, that the injury complained of did not result from any want of care, on the part of the company, or her employees, and hence, the company was not liable for damages.

Held, also, that when a plaintiff is in fault, but the defendant is aware of it in time to avoid injuring him, by reasonable diligence, the failure to use such diligence is held to be, alone, the proximate and immediate cause of the injury.

Held, also, that in this class of cases, the complaint must show, by averment, that the plaintiff was not in fault, but that the wrongful act of the defendant, alone, was the proximate cause of the injury.

Wednesday,
November 27.

APPEAL from the *Sullivan* Circuit Court.

PERKINS, J.—*Hiatt* sued *The Evansville and Crawfordsville Railroad Company*, to recover damages occasioned by an injury he received from the cars on said road, and recovered a judgment for \$1,200. The company has appealed to this Court. The complaint, in the case, does not aver that the

17	102
151	615
151	617
17	102
168	626

plaintiff was not in fault, but it alleges that he, for the purpose of rescuing his father, jumped upon the railroad track, with full knowledge of the nearness and speed of the train, his father, old and infirm, having also entered upon, and started up the track, immediately in front of the approaching train. This is plain, from the averment that he was met by the train, almost immediately after he entered upon the track.

As there is no conflict in the evidence, touching the material facts, we shall set them out, and express an opinion upon them. On August 29, 1856, in the forenoon, a locomotive and train of hopper-shaped gravel cars were standing on the track of *The Evansville and Crawfordsville Railroad*, at the depot and water station of *Sullivan*, in *Sullivan* county, *Indiana*, where it had stopped, temporarily, while on its way backing down the road. The train consisted of thirty cars, and was four hundred and twenty feet long. It had passed up, and deposited its load of gravel, that morning, and was on its return to the gravel pit.

About four hundred yards down the road, from the train above mentioned, stood *Mr. Riley's* mill. *Mr. Riley* wanted a car that stood upon a switch at the depot, close to the gravel train, and he concluded to take that time to go up and get it. He wanted to load the car, with freight from his mill. A *Mr. Gray*, and two men, father and son, by the name of *Hiatt*, were standing about *Riley's* mill, and he asked them to go up and help him push down the car, and they consented to go. There was a road, other than the railroad, from the mill to the depot, and also a side path, but the four men concluded to go up the railroad track. The gravel train was just starting down the track toward them, as they started up. The whistle was blown, the train was in full view, and they saw it in motion, as they started. The men had three bridges, not planked, but to be walked over on the timbers, to cross, one of them thirty-five feet long. As the men and the cars approached each other, *Gray*, *Riley* and *Hiatt*, the son, as soon as they got across the bridge mentioned, stepped off the track, but *Hiatt*, the father, did not, but stopped on the bridge. The son, seeing this, hastened back on to the bridge, seized his father, and

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badly that it had to be amputated.

The train had not got, and had not had time to get, under rapid headway, but was moving at, perhaps, about four miles an hour. The hands in charge of the train knew nothing as to who the men upon the track were, their condition, or what was their business. When they discovered, (a thing rather difficult to do, as a long train was between them and the men,) that all did not go off the track, as a part did, they reversed the engine, applied the brakes, and made all reasonable effort to stop the train. They were guilty of no manner of negligence whatever.

The question, then, arises, why was *Hiatt* injured by the railroad train? How came he to be injured? The railroad train was in its proper place, in pursuit of its lawful business, was not practicing aggression upon any one, and was running with proper speed and caution. Why was *Hiatt* injured? Because his father was carelessly remaining upon the railroad track, in front of an approaching train, which it was his duty to avoid, and which those in the management of the train had a right to presume he would avoid, but which he carelessly failed to do; and because, further, the son, the injured person, was prompted by his generosity and filial affection, to involve himself in the hazard of his father's carelessness. If it be said that the father was old and feeble, and unable to get out of the way of the train, then we say the carelessness, the rashness, of going upon the track in front of an approaching train was still greater, and involves those who were with the old man, to some extent, in the carelessness, in not preventing him from going upon the track, or, at all events, keeping close to him, with watchfulness, while he was on it. It is time that the public should begin to be aware that a railroad track is not a highway for general travel. As the injured party, then, was in fault, in continuing so long upon the track, if not, indeed, in going upon it at all, under the circumstances, and the railroad operatives, after they discovered the condition of the persons, were guilty of no neglect in trying to avoid the collision,

the plaintiff can not recover. *Wright v. Brown*, 4 Ind. 95; *Nov. Term, Wright v. Gaff*, 6 *id.* 416; *The Pittsburg, &c. Railroad Co. 1861.*
v. Karns, 13 *id.* 87; *The Indiana, &c. Railroad Co. v. Hudson*, *id.* 325; *The Evansville, &c. Railroad Co. v. Lowler-*
mill, 15 *id.* 120. It seems that where a plaintiff is in fault,
 but the defendants are aware of it in time to avoid injuring
 him by reasonable diligence, their want of diligence is held to
 be, alone, the proximate, the immediate cause of the injury.

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The sufficiency of the complaint in this case has been discussed. In this class of suits, the plaintiff must, as a general proposition, prove that the proximate, the immediate, cause of the injury sued for, was the wrongful act of the defendant, to which injury his own wrongful act did not immediately contribute; at least, the facts must develop this. Hence, the question of negligence, on the part of the plaintiff, arises under the general denial. It is embraced in the issue made by such denial. 1 Hilliard on Torts, p. 133. Hence, the further rule as to the complaint, that it must show by averments that the plaintiff was not in fault. The complaint in this case, as will appear from what we have said upon the facts, does not sufficiently excuse the plaintiff. *The President, &c. v. Dusouchett*, 2 Ind. 586; *The Wayne, &c. Turnpike Co. v. Berry*, 5 *id.* 286. Our statute makes railroad companies liable for killing stock, but not men, without regard to negligence, where the road is not fenced.

Per Curiam.—The judgment is reversed, with costs, for want of a sufficient complaint. Cause remanded for further proceedings, with leave to amend, &c.

John P. Usher, for the appellant.

J. E. McDonald and *A. L. Roache*, for the appellee.

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The personal representatives of a person whose death was caused by the wrongful act of another, can maintain an action therefor only where the deceased might, had he lived, have maintained an action for an injury, the

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result of the same act or omission; and this he could not have done, if his own misconduct contributed directly to the tortious act or omission from which the injury resulted.

The rule of the common law, that it must appear that the person committing the tortious act has been prosecuted criminally to conviction, before a civil suit can be maintained for the injury, does not prevail in the *United States*.

Wednesday,
November 27.

APPEAL from the *Washington* Circuit Court.

PERKINS, J. — *Simeon Lofton* killed *John Vogles*. The administrator of *Vogles* now sues *Lofton*, in a civil action, to recover damages for the loss of *Vogles*' life.

The suit is brought upon § 784, p. 205, 2 R. S., which provides that "when the death of one is caused by the wrongful act or omission of another, the personal representatives of the former may maintain an action therefor against the latter, if the former might have maintained an action, had he lived, against the latter, for an injury for the same act or omission."

The former, had he lived, could not have maintained an action, in the case at bar, against the latter for the tortious act or omission complained of, if his own misconduct contributed directly to that tortious act or omission. 1 *Hilliard on Torts*, p. 132; *The Pittsburgh, &c. Railroad Co. v. Karns*, 13 Ind. 87.

Did, then, *Vogles* commit any wrongful act which caused the tort whereby he came to his death? The witness on the part of the plaintiff thus states the transaction:

"I saw *Lofton* coming out to the pike from the direction of *Vogles*' store door, walking rapidly, and turning westward up the pike, as if going home. I saw *Vogles* come out of his store after *Lofton*, walking rapidly, and come round in front so as to face him. He was talking loud and angrily. He repeatedly called *Lofton* a damned liar, and on *Lofton*'s replying that he lied, *Vogles* 'grabbed at *Lofton*'s throat,' with one hand, and struck him with the other. *Lofton* then drew a small, old, broken pocket knife and stuck *Vogles*. *Vogles* then gathered brick-bats and stones, which he threw at *Lofton*. *Vogles* died of the wounds he received in the fight, from *Lofton*'s knife. *Lofton* expressed great sorrow at the occurrence, and the act he had committed, and said it was

only because he was 'jumped on to' so violently that it was the only alternative left to save himself." *Vogles* was a much younger man than *Lofton*, about the same size, but much the more active and athletic. He was a quick, active man, about thirty years of age. See 14 Ind. 1. If this evidence, and it represents the case, does not show that the wrongful act of *Vogles* contributed to produce the act which caused his death, it is difficult to conceive of any that would. The evidence does not show that *Lofton* had given *Vogles* any cause to pursue him on leaving the store, but the contrary. *Lofton* had called at the store to collect money that *Vogles* owed him. *Vogles* insulted *Lofton*; the latter complained, made an angry remark, and left the store. *Vogles* jumped over the counter and pursued him. Then occurred the street rencounter, terminating in *Vogles*' death, as above detailed.

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Another position taken is, that this civil suit can not be maintained by the plaintiff without his first showing that he has criminally prosecuted the defendant to conviction; that such criminal prosecution is a condition precedent to a civil suit. This rule of the common law does not prevail in the *United States*. We do not here depend upon the injured party, or his representative, to institute criminal prosecutions. We have no *market overt* sales, by which stolen property is protected in the hands of a purchaser till the thief is convicted. We have no forfeiture of estate for felony, whereby the criminal is deprived of the means of satisfying a judgment in a civil action, should one be obtained. See 4 Black. Comm., p 6; *Boston, &c. Railroad Co. v. Dana*, 1 Gray, 83, and cases cited; *Hoffman v. Carver*, 22 Wend. 255; *Ballew v. Alexander*, 6 Humph. (Tenn.) 433; 1 Hiliard on Torts, p. 71, *et seq.*

Per Curiam.—The judgment is reversed, with costs. Cause remanded for further proceedings, in accordance with this opinion, with leave to either party to amend.

C. L. Dunham and *Horace Heffren*, for the appellant.

R. Crawford, *J. H. Stotzenburg* and *T. M. Brown*, for the appellee.

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LEWIS and Others v. PHILLIPS.

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17	108
129	335
129	436

17	108
139	197

17	108
153	672

In the absence of any statutory provision, directing or authorizing it, the clerk has no authority to issue an execution upon a judgment, without being directed so to do by the judgment plaintiff, or his attorney.

The property in a judgment, is in the judgment plaintiff, and he alone, or those acting for him, have the right to order an execution, or to delay it.

Quære: Whether § 428, 2 R. S. 1852, p. 176, which provides that at the expiration of the stay, it shall be the duty of the clerk to issue a joint execution against the property of all the judgment debtors, and the replevin bail, should not be construed to be directory as to the manner of the execution, rather than a direction to issue upon the expiration of the stay.

Perhaps an execution defendant could not complain, where a clerk issues an execution without authority from the plaintiff, if the plaintiff afterward acquiesces in, and ratifies the act; nor could the plaintiff, in such case, object that the clerk had no authority to issue the execution.

Where a deputy clerk issues an execution, without authority from the judgment plaintiff, and without any direction from his principal so to do, and afterward becomes a purchaser at a sale on the execution, he can take no benefit from his purchase, although no actual fraud entered into the transaction.

One who afterward purchased the property from the deputy clerk, without any knowledge of the improvident issuing of the writ, having paid the purchase money and received a deed before notice, could not be disturbed in his title, on account of the want of authority in the clerk to issue the execution.

Notice before actual payment of *all* the purchase money, although it be secured, and the conveyance actually executed, is equivalent to notice before the contract, and one having such notice cannot claim the rights of an innocent purchaser, without notice.

Quære: Whether the purchaser is, in such case, entitled to hold the land as an indemnity for what he has paid before notice, and if so, under what circumstances?

Friday,
November 29.

APPEAL from the *Gibson* Circuit Court.

WORDEN, J.—This was an action by *Phillips* against *James Su'phen* and his wife, *Alexander C. Donald*, *Andrew Lewis*, and *Daniel Ward*. The complaint alleges, in substance, that on *March 30, 1859*, the plaintiff recovered a judgment in the *Gibson* Circuit Court, against *Su'phen* and wife, and a foreclosure of a mortgage, for the sum of \$575, and costs. That at the time of the recovery of the judgment,

the plaintiff was, and ever since has been, and still is, a resident of the State of *Pennsylvania*, and that his attorney resided in the city of *Evansville*, in the State of *Indiana*. That at the time of the rendition of the judgment, and for six months thereafter, *Lewis* was the clerk of the *Gibson* Circuit Court, and *Donald* was his deputy. That soon after the rendition of the judgment, *Lewis*, by *Donald*, his deputy, without the knowledge or consent, order or direction, of the plaintiff, or his attorney, issued to the sheriff a certified copy of the judgment of foreclosure, and order of sale, under the seal of the Court, by virtue of which, the sheriff, having duly advertised the property, on *May* 4, 1859, sold the same, and the defendant, *Donald*, became the purchaser thereof, at the sum of \$149.50, and received the sheriff's deed therefor, the property being at the time worth \$800. That *Donald* paid the purchase money to the sheriff, who applied \$12.55 thereof to the costs, and paid the residue to *Lewis*, as clerk, in whose hands it remains. That neither the plaintiff nor his attorney had any knowledge, intimation, or suspicion of the issuing of the order of sale, or of the sale of the land by the sheriff by virtue thereof, until long after the sale and conveyance. That the defendants in the judgment of foreclosure are insolvent, and the premises mortgaged the only property out of which the judgment, or any part of it, can be realized. That the defendants, *Lewis* and *Donald*, fraudulently, and without the authority, knowledge, or consent of the plaintiff or his attorneys, issued the execution for the purpose of enabling *Donald* to purchase the property at less than its value. That after the purchase of the land by *Donald*, he sold and conveyed the same to the defendant, *Ward*, for the sum of \$500, a part of which was paid down, and the residue remains unpaid. That if the plaintiff had known of the sale thus made by the sheriff, he would have bid on the property the amount of his judgment and costs, which he will do if the sale shall be set aside, and the property again exposed to sale.

Prayer that the sale be set aside, &c.

Process was returned "not found," as to *Sutphen* and wife, and the cause proceeded as to the other defendants, who

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Nov. Term, filed a demurrer to the complaint, which was overruled, and
 1861. they excepted. The defendants, *Lewis, Donald* and *Ward*,
 then answered by general denial.

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The cause was tried by a jury, who found for the plaintiff, generally, and rendered answers to special interrogatories propounded to them. Motion for a new trial overruled, and judgment, setting aside the sheriff's sale and deed to *Donald*, and the deed from *Donald* to *Ward*.

The first error assigned is in overruling the demurrer to the complaint.

It is claimed that the clerk had authority to issue the execution without any direction, so to do, from the plaintiff, or his attorney. In the absence of any statutory provision, giving him such authority, or making it his duty so to do, it is clear that he had no such authority. The clerk of a Court, as such, has no more right to control, or direct, an execution upon a judgment, than any other third person. The property in a judgment is in the plaintiff therein, and he alone, or those acting for him, have the exclusive right to order an execution, or delay it. The following observations, made by the Court in *Hampton, ex parte*, 2 Greene's (Iowa) Rep. 137, are pertinent here:

"It not unfrequently happens that the parties, plaintiff and defendant, in the exercise of right, and in the spirit of justice and compromise, agree upon terms by which the stern and rigorous proceeding of law is stayed, and time and opportunity afforded for the defeated party to satisfy the demands of the law, with the consent of his successful antagonist. Courts will not prevent the parties from acting with conciliation and forbearance, promotive of convenience. To allow the officers of a Court, or witnesses, to whom fees may be due, to step in and control the cause, either before, or after, judgment, by ordering process to issue, would be a manifest privation of the rights of the parties. A judgment, when entered, is subject to the control of the party in whose favor it is. He, or his agent or attorney, may, in the use of the proper process of the law, enforce it, and no other person. If fees be due to the officers of the Courts, or witnesses, and they are

unreasonably delayed in their collection by the parties to the proceeding, the law gives them a remedy for services rendered. They may enforce their rights by proceeding against the party liable."

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We are referred to the following statutory provisions, as authorizing the clerk to issue execution, without the direction of the plaintiff. 2 R. S. 1852, §§ 428, 429, p. 133; *id.* § 635, p. 176. Section 428 provides, that "at the expiration of the stay, it shall be the duty of the clerk to issue a joint execution against the property of all the judgment debtors, and replevin bail," &c. This section should, probably, be construed to be a direction as to the manner of the execution when it issues, that is, against the debtor and replevin bail, rather than a direction to issue upon the expiration of the stay. But this point need not be, and is not, decided, as the provision has no application here, the judgment in question not having been stayed. Section 429 provides, that upon judgments recovered against any officer, &c., for money received in a fiduciary capacity, or for a breach of any official duty, the clerk shall issue execution forthwith, returnable in ninety days, to be indorsed "not repleviable," and it shall be so ordered in the judgment. It is obvious that this section has no application here.

Section 635 provides, that "a copy of the order of sale, and judgment, shall be issued and certified by the clerk, under the seal of the Court, to the sheriff, who shall thereupon proceed to sell the mortgaged premises, or so much thereof as may be necessary to satisfy the judgment, interest and costs, as upon execution," &c.

The intention of the Legislature was, by this section, to provide for the manner of carrying into execution judgments of foreclosure. A copy of the order of sale and judgment is to be issued, and thereupon the sheriff is to sell as upon execution. No direction is given by the statute as to the time when, or circumstances under which, the copy of the order, &c., is to be issued. It is obvious that it can be properly issued, only when it is directed by the proper party.

Perhaps an execution defendant could not complain, where a clerk issues without authority of the plaintiff, if the

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plaintiff afterward acquiesces in it, and ratifies the act; nor could the plaintiff, under such circumstances, object that the clerk had no authority to issue the execution. Such, however, is not the case here. The plaintiff was ignorant of the fact that an execution had issued, until after the sale, and has done nothing to show an acquiescence, or ratification.

The order of sale having been issued, and the sale having taken place, without the plaintiff's knowledge or authority, he should not be injured thereby, and the sale should be set aside, unless the rights of third parties, who are innocent, would be injuriously affected. It is objected, that the complaint is bad, for not averring that *Donald* had notice that *Lewis*, his principal, was not authorized by the plaintiff to issue the order.

The order of sale was issued by *Donald*, himself, as the deputy of *Lewis*, and, so far as appears, without any special directions from the latter. Without directions from *Lewis*, to issue the order of sale, *Donald* would have no right, whatever, to presume that *Lewis* had authority from the plaintiff. He can not acquire an advantage, injurious to the plaintiff, from his own unauthorized act.

There was no error in overruling the demurrer. The evidence is in the record, and fully sustains the verdict.

Exceptions were taken to the ruling of the Court, in excluding evidence having a tendency to negative actual fraud, and to the refusal of the Court to instruct, as asked, on that subject. We shall not extend this opinion, by entering into these details, because the charges given accord with our opinion, as above expressed, and because the action is maintainable, and the judgment right, although no actual fraud be shown. *Donald*, having issued the order of sale without authority from the plaintiff, and without having shown directions from his principal to do so, can take no advantage, as against the plaintiff, from his purchase, although no actual fraud entered into the transaction.

A different question, however, arises as respects *Ward*, the purchaser from *Donald*. He, so far as appears, purchased without any knowledge of the improvident issuing of the order of sale. He could be required to look no

further than to see that *Donald's* purchase was made under a judgment, and an execution that was warranted by the judgment. *Carpenter v. Doe*, 2 Ind. 465. Had he paid the purchase money before notice, having received his deed from *Donald*, it is not perceived that his title could have been disturbed. The jury, however, returned in their special findings, that of the purchase money, \$366 remained due from him to *Dona'd*.

The question arises whether, under the circumstances, he can be regarded as a purchaser in good faith, and for a valuable consideration, before notice, and, as such, entitled to hold the land.

The rule on this subject, as laid down by *Sugden*, is that "Notice, before actual payment of all the money, although it be secured, and the conveyance actually executed, or before the execution of the conveyance, notwithstanding the money be paid, is equivalent to notice before the contract." See 2 Sug. on Vend., 7 Am. ed., top p. 533, and notes. This rule, as to the necessity of payment of all the purchase money before notice, has been sanctioned and acted upon by this Court. *Dugan v. Vattier*, 3 Blackf. 245. This is, undoubtedly, the English doctrine, and it seems to accord, also, with the weight of American authorities. See observations and authorities collected, on this subject, in 2 Lead. Ca. in Eq., 3 Am. ed., pp. 101, 116. There are few, if any, cases, holding that the payment of part of the purchase money, before notice, although the purchaser has taken a conveyance, is sufficient to enable him to hold the land, as against him who has a prior equitable right. But, while this is the case, there is an evident tendency, in the decisions, to afford the purchaser relief and indemnity, in a proper case, by giving him a lien upon the land, or rather, by permitting him to make use of his legal title to secure himself for the purchase money paid before notice, and for improvements made on the land. See authorities above cited.

In *Dart's Vend. & Pur.*, by Waterman, p. 389, it is said, that "when the conveyance has been executed, and a part only of the money paid, before notice, the purchaser may, it is conceived, clearly avail himself of the legal estate,

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Nov. Term, 1861. *as a security, to the extent of the sum so paid." In the case here, the defendant, Ward, did not, either in his answer, or in any other manner, insist upon an indemnity. He asked for no relief, and in no manner raised the question, whether he was entitled to be reimbursed for the amount paid before notice. The remark of Gibson, J., in *Youst v. Martin*, 3 S. & R. 423, 433, in reviewing former English decisions upon this question, is applicable here. He says, "in none of the cases on the subject, did the defendant insist on indemnity, but, on the contrary, claimed the land itself, insisting that part payment gave him an indefeasible title."*

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SPEARS.

The purchase money due from *Ward* to *Donald*, not being all paid, and that fact being sufficient to prevent him from holding the land, as against the plaintiff, and no question having been raised as to *Ward's* right to be indemnified for the amount he had paid, the judgment must be affirmed.

The question whether a purchaser is entitled, in any case, to hold the land as an indemnity for what he has paid before notice, and if so, under what circumstances, it is unnecessary that we should decide.

Per Curiam.—The judgment is affirmed, with costs.

J. G. Jones, J. E. Blythe and Alex. C. Donald, for the appellants.

Conrad Baker, for the appellee.

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Friday,
November 29

APPEAL from the *Jasper* Circuit Court.

Per Curiam.—Judgment by default. No effort was made, in the Court below, to be relieved from the same, or any supposed errors.

The judgment is affirmed, with 3 per cent. damages and costs.

J. E. McDonald and A. L. Roache, for the appellant.

F. M. Finch and H. Crawford, for the appellee.

PECK v. MARTIN.

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MARTIN.

Suit against a physician, for malpractice. The complaint averred that the defendant was a practicing physician, and, as such, was called on by the plaintiff to visit and treat his child; but contained no averment of any special consideration for the undertaking of the physician, nor any allegation of duty, on which he undertook, &c.

Held, that though no special consideration was alleged, the promise to pay a reasonable reward was implied, from the employment; and the duty, on the part of the physician, to exercise a reasonable degree of care and skill, resulted from the character in which he assumed to act.

Held, also, that the complaint was good, on motion in arrest, the defects, if any, being cured by the verdict; in support of which it will be presumed that the plaintiff, in employing the defendant, became bound by an implied promise, to pay him what his services were worth.

APPEAL from the *Davies* Circuit Court.

Friday,
November 29.

WORDEN, J.—Action by *Martin*, against *Peck*. Answer, trial; verdict and judgment for the plaintiff, a motion in arrest being overruled.

The only question in the case, arises on the ruling upon the motion in arrest.

The complaint is as follows, viz., "*Andrew Martin*, plaintiff in this suit, complains of *Samuel N. Peck*, defendant, and says, that on, &c., the said defendant was a practicing physician and surgeon, at said county, and that, as such physician and surgeon, he was called upon by the plaintiff, to visit one *Mary Ann Martin*, of the age of ten years, the child, daughter and servant of the plaintiff, who was then sick; and the said defendant was then, and on divers days and times after said last mentioned day, and (before) the time of bringing this suit, requested by said plaintiff to administer the proper medicines, and treatment, for the cure of the said *Mary Ann*, the child, daughter and servant, of the plaintiff. And the said plaintiff says, that the said defendant, on the days and times aforesaid, undertook, as such physician and surgeon, to administer medicines to the said *Mary Ann*, child, &c., of the plaintiff.

And the plaintiff avers that the said defendant so negligently, unskillfully, and unprofessionally managed and treated

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said child, that she became, by reason thereof, imbecile, speechless, and wholly insane; and defendant did then and there so negligently, unskillfully and unprofessionally administer said medicines, and then and there also gave and administered such poisonous, noxious, and improper drugs to the said *Mary Ann*, that she was thrown into spasms, and thereby became demented, and lost all her mind and reason, and power of speech, and all her mental and physical powers have failed her. During all of which time the plaintiff lost, and has been deprived of, the service of his said daughter and servant, and of all the benefit and advantage which might, and would otherwise, have arisen and accrued to him from such service, as well as the comfort of her society, wherefore," &c.

The objection to the complaint is thus stated in the brief of counsel for the appellant: "This complaint is founded on *contract*; and even if it be considered as founded on tort, still, 'in an action on the case, founded on an express or implied *contract*, as against an attorney,' &c., the declaration must *correctly state the contract*, or the particular *duty* or *consideration*, from which the liability results, and on which it is founded.' 1 Chit. Pl. 384. In short, we hold that in this case, the declaration must state *a valid contract*, either by alleging the *duty*, or by stating the *consideration*, on which *Peck* undertook, &c. No such duty or consideration is stated in the complaint, and for this omission, we contend that it is materially defective. We believe no authority can be found to the contrary."

In *England*, "a physician, or a medical practitioner affecting to be a physician, has no remedy at law to recover a remuneration for his services. The reason is, that he is presumed to act with a view only to an honorary reward." Chit. on Cont. 573. In this country, however, it is different, for here he can recover for his services in the same manner as an attorney, or other person, performing services for another. An employment of him by a party, without express agreement as to compensation, raises an implied agreement on the part of the employer to pay what his services are reasonably worth. In the case at bar, although it is not

alleged that the defendant undertook to perform the services "for and in consideration of a certain reasonable reward, to be paid him therefor by the plaintiff," yet this is implied from the employment.

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MARTIN.

Again, it is alleged that the defendant was a practicing physician and surgeon, and that as such he undertook the employment. The *duty* arising from such character and undertaking, to exercise a reasonable degree of care and skill, is as apparent as if it were stated in terms.

It may well be doubted whether, under our system of pleading, the supposed defects would be fatal, on demurrer; but this point we do not decide, as the question does not arise in that manner. The complaint, we have no doubt, is good, on motion in arrest of judgment. The supposed defects are, undoubtedly, cured by verdict. Chit. Pl. 673. "The expression, *cured by verdict*," says Mr. Chitty, "signifies that the Court will, after a verdict, presume, or intend, that the particular thing which appears to be defectively or imperfectly stated, or omitted, in the pleading, was duly proved at the trial. And such intendment must arise, not merely from the verdict, but from the united effect of the verdict and the issue upon which such verdict was given. On the one hand, the particular thing which is presumed to have been proved, must always be such as can be implied *from allegations on the record, by fair and reasonable intendment*. And on the other hand, a verdict for the party in whose favor such intendment is made, is indispensably necessary, for it is in consequence of such verdict, and in order to support it, that the Court is induced to put a liberal construction upon the allegations in the record." *Id.* Can it not be implied from the allegations in the complaint, "by fair and reasonable intendment," that the plaintiff, in employing the defendant, became bound by an implied promise to pay him what his services were worth? If so, this implied promise furnishes a sufficient consideration for the defendant's undertaking. A case put by Mr. Chitty to illustrate the doctrine is much in point. At page 677, he says: "In another case of an action of assumpsit, the declaration stated that the plaintiff had retained the defendant (who was not an

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LEWIS and Others v. PHILLIPS.

LEWIS
v.
PHILLIPS.

17	108
139	385
139	430
17	108
139	197
17	108
153	672

In the absence of any statutory provision, directing or authorizing it, the clerk has no authority to issue an execution upon a judgment, without being directed so to do by the judgment plaintiff, or his attorney.

The property in a judgment, is in the judgment plaintiff, and he alone, or those acting for him, have the right to order an execution, or to delay it.

Quare: Whether § 428, 2 R. S. 1852, p. 176, which provides that at the expiration of the stay, it shall be the duty of the clerk to issue a joint execution against the property of all the judgment debtors, and the replevin bail, should not be construed to be directory as to the manner of the execution, rather than a direction to issue upon the expiration of the stay.

Perhaps an execution defendant could not complain, where a clerk issues an execution without authority from the plaintiff, if the plaintiff afterward acquiesces in, and ratifies the act; nor could the plaintiff, in such case, object that the clerk had no authority to issue the execution.

Where a deputy clerk issues an execution, without authority from the judgment plaintiff, and without any direction from his principal so to do, and afterward becomes a purchaser at a sale on the execution, he can take no benefit from his purchase, although no actual fraud entered into the transaction.

One who afterward purchased the property from the deputy clerk, without any knowledge of the improvident issuing of the writ, having paid the purchase money and received a deed before notice, could not be disturbed in his title, on account of the want of authority in the clerk to issue the execution.

Notice before actual payment of *all* the purchase money, although it be secured, and the conveyance actually executed, is equivalent to notice before the contract, and one having such notice cannot claim the rights of an innocent purchaser, without notice.

Quare: Whether the purchaser is, in such case, entitled to hold the land as an indemnity for what he has paid before notice, and if so, under what circumstances?

Friday,
November 29.

APPEAL from the *Gibson* Circuit Court.

WORDEN, J.—This was an action by *Phillips* against *James Supphen* and his wife, *Alexander C. Donald*, *Andrew Lewis*, and *Daniel Ward*. The complaint alleges, in substance, that on *March 30, 1859*, the plaintiff recovered a judgment in the *Gibson* Circuit Court, against *Supphen* and wife, and a foreclosure of a mortgage, for the sum of \$575, and costs. That at the time of the recovery of the judgment,

the plaintiff was, and ever since has been, and still is, a resident of the State of *Pennsylvania*, and that his attorney resided in the city of *Evansville*, in the State of *Indiana*. That at the time of the rendition of the judgment, and for six months thereafter, *Lewis* was the clerk of the *Gibson* Circuit Court, and *Donald* was his deputy. That soon after the rendition of the judgment, *Lewis*, by *Donald*, his deputy, without the knowledge or consent, order or direction, of the plaintiff, or his attorney, issued to the sheriff a certified copy of the judgment of foreclosure, and order of sale, under the seal of the Court, by virtue of which, the sheriff, having duly advertised the property, on *May 4*, 1859, sold the same, and the defendant, *Donald*, became the purchaser thereof, at the sum of \$149.50, and received the sheriff's deed therefor, the property being at the time worth \$800. That *Donald* paid the purchase money to the sheriff, who applied \$12.55 thereof to the costs, and paid the residue to *Lewis*, as clerk, in whose hands it remains. That neither the plaintiff nor his attorney had any knowledge, intimation, or suspicion of the issuing of the order of sale, or of the sale of the land by the sheriff by virtue thereof, until long after the sale and conveyance. That the defendants in the judgment of foreclosure are insolvent, and the premises mortgaged the only property out of which the judgment, or any part of it, can be realized. That the defendants, *Lewis* and *Donald*, fraudulently, and without the authority, knowledge, or consent of the plaintiff or his attorneys, issued the execution for the purpose of enabling *Donald* to purchase the property at less than its value. That after the purchase of the land by *Donald*, he sold and conveyed the same to the defendant, *Ward*, for the sum of \$500, a part of which was paid down, and the residue remains unpaid. That if the plaintiff had known of the sale thus made by the sheriff, he would have bid on the property the amount of his judgment and costs, which he will do if the sale shall be set aside, and the property again exposed to sale.

Prayer that the sale be set aside, &c.

Process was returned "not found," as to *Sutphen* and wife, and the cause proceeded as to the other defendants, who

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1861.

LEWIS
V.
PHILLIPS.

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1861.

PHILLIPS
v.
REICHERT.

As there was an exception spread upon the record to the ruling of the Court on defendant's motion for judgment, we do not perceive the necessity of a motion for a new trial, to bring the correctness of that ruling before this Court.

The Court did not err in refusing to render a judgment for the defendant upon the special finding of facts.

It might be true that the deceased left his father's house voluntarily; that he was twenty years of age; that he was healthy when he left, and capable of making a living; and yet all these facts are not inconsistent with the allegation that the services rendered, and expenses incurred, were at the request of the defendant. As we do not see the evidence, we are not apprised of the proof upon that point.

The question which has been so elaborately argued is not, therefore, before us, namely, whether there was a moral and implied legal liability, growing out of the circumstances, binding upon the defendant.

Per Curiam.—The judgment is affirmed, with 3 per cent damages and costs.

John H. Baker, for the appellant.

PHILLIPS and Another v. REICHERT.

17 120
154 172

Where there is an entire failure of title to real estate conveyed with covenants of warranty, the measure of damages for a breach of the covenants, in the absence of fraud, is the purchase money and interest.

If the eviction is partial only, the damages will bear the same proportion to the whole purchase money, that the value of the part to which the title failed bears to the whole premises, estimated at the price paid.

The fact that the land was bought for a particular purpose, which was known to the vendor, can make no difference in respect to the rule of damages for a breach of the covenants.

Quære: Whether the vendee might not rescind the contract, on a failure of the title to that part which constituted the principal inducement to the purchase.

The basis of damages in case of a partial failure of title, should be the

relative general value of the part to which the title has failed, compared with the whole, without limitation of the purposes to which it may be applied, or for which it may have value.

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1861.

PHILLIPS
v.
REICHERT.

APPEAL from the *Posey* Circuit Court.

WOREEN, J.—Action by the appellants against the appellee, upon a promissory note, and to foreclose a mortgage, executed by *Reichert* to one *Charles Graddy*, and by the latter indorsed to the plaintiffs.

Friday,
November 29.

The note was for \$150, and was given in part consideration for the sale of a certain piece of land, by *Graddy* to the defendant, which was conveyed by deed of general warranty. The entire purchase money was \$600, and the note in suit was for the last payment.

Defense, that the defendant had been evicted from part of the premises by a paramount title. That he purchased the premises expressly for the purpose of erecting a lager-beer cellar, in a ravine on the part thereof from which he has been evicted, and that the part from which he has been ousted is indispensable to the trade and business of a brewer for such cellar, and that the lot is not worth as much by \$200, as the defendant agreed to pay for the same, in consequence of said ouster.

Issue, and trial by the Court. Finding and judgment for the defendant.

The Court found specially the following facts, on which the question here involved, depends:

"2. That said lot, at the time of the purchase thereof by the defendant from *Graddy*, had erected thereon a dwelling-house, which is still on said lot; and that one of the main objects for which the lot was purchased, was that said defendant might erect a lager-beer cellar thereon, which object was known to *Graddy* at the time of the purchase.

"3. That since said conveyance, the said defendant has been evicted from the west end of said lot by a paramount title, the said *Graddy* not being the owner in fee of the west end of said lot, at the time of said conveyance.

"4. That the whole price, or purchase money, of said lot was \$600, and that by reason of the failure of title to the

Nov. Term, 1861. **PHILLIPS** v. **REICHERT.** west end thereof, it is unfit for the purpose for which it was, in part, purchased, and is therefore worth to the defendant \$200 less, for the purpose for which he purchased, than the entire lot would have been worth.

"5. That the general value, that is, the value for ordinary purposes, of that part of the lot to which the title failed as aforesaid, was \$30, taking the entire purchase money, or \$600, as the criterion of the value of the whole lot.

"6. The Court, therefore, finds generally for the defendant."

Motion for a new trial overruled.

The question presented is, whether the Court adopted the correct rule as to the measure of damages. The measure of damages, it is evident, must be the same as if the defendant were suing *Graddy* for a breach of the covenants in his deed.

It is well settled, that where there is an entire failure of title, the measure of damages for a breach of the covenants, in the absence of fraud, is the purchase money and interest. *Reese v. McQuilkin*, 7 Ind. 450.

It would seem to follow, as a corollary of this rule, that where the eviction is partial, the damages will bear the same proportion to the whole purchase money, as the value of the part to which the title fails bears to the whole premises, estimated at the price paid. This, accordingly, seems to be the settled rule. *Rawle on Cov.* p. 88, ed. 1860; *Sedgwick on Dam.* 3d ed., 175; *Cornell v. Jackson*, 3 Cush. (Mass.) 510; *Morris v. Phelps*, 5 Johns. 49; *Giles v. Dugro*, 1 Duer, 331; *Wiley v. Howard*, 15 Ind. 169.

But it is claimed that inasmuch as the lot was purchased for a particular purpose, which was known to the vendor, and as the failure of title to a part renders the premises useless for that purpose, the case is taken out of the rule indicated. The counsel for the appellee admits that there are no authorities directly sustaining the position thus assumed. We have looked, within a limited range, for authorities upon this point, but find none. The absence of authority sustaining the position is some evidence, at least, that such is not the law. An analogy is sought to be drawn from the rule that

where goods are ordered from a manufacturer for a particular purpose, there is an implied warranty that they shall be fit for the purpose designed. Such warranty may well be implied, and yet furnish no analogy for settling the rule of damages on a breach of the express warranty of title contained in the covenants of a deed.

We think, in principle, the fact that land was bought for a particular purpose, which was known to the vendor, can make no difference in respect to the rule of damages, for a breach of the covenants. The purpose for which the land was bought, does not enter into the covenants. They bind the covenantor, that he is seized of the land, and that he will warrant and defend the title, or in default thereof, that he will return the purchase money and interest; or, if the title fail in part, that he will return a ratable proportion of the purchase money and interest. The fact that the land was bought for a particular purpose, cannot have the effect of increasing the liability thus imposed by the covenants. If the land was sold in good faith, and without fraud, the vendor supposing he had title to the whole, no reason is perceived why he should be held to a greater degree of liability on his covenants, than if he had not known the purpose to which the purchaser intended to apply it. In the case of *Dimmick v. Lockwood*, 10 Wend. 142, 155, it was said by the Court, "One ground assumed by *Kent*, when chief justice, in *Saats v. Ten Eyck*, and also by Chief Justice *Tilghman*, in *Bender v. Fromberger*, is this: "that the title of land rests as much in the knowledge of the purchaser as the seller; it depends upon writings, which both can examine." Again, "it is agreed on all hands, that if fraud can be shown, or concealment, which would be evidence of it, that would constitute a good ground of action, in which the purchaser could recover all his damages."

We have not examined the question whether the defendant might not, had he chosen to do so, have rescinded the contract, on the failure of the title to that part which constituted the principal inducement to the purchase; but whether he could have done so or not, we think the \$30, found by the Court to be the value of the part to which the

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Nov. Term, 1861. title failed, taking the purchase money as the criterion of the value of the whole, was the true measure of damages; and, therefore, that the Court should not have found, generally, for the defendant.

LINGLE
v.
CLEMENS.

It should be observed, however, that perhaps the fifth finding of the Court does not furnish a strictly accurate basis for the assessment of damages. If the value of the part to which the title failed, is less "for ordinary purposes," than it is for any particular purpose to which it is adapted, and may be applied, as, for instance, a lager-beer cellar, the basis is wrong. The basis should be its relative, general value, compared with the whole, without limitation of the purposes to which it may be applied, or for which it may have value.

A new trial should be awarded.

Per Curiam.—The judgment below is reversed, with costs.

Conrad Baker and J. P. Edson, for the appellants.

Alvin P. Hovey, for the appellee.

LINGLE v. CLEMENS and Another.

Suit for work and labor. Answer: that the work was done under a parol contract that the plaintiff would receive in payment, one of two designated town lots, which, on the completion of the work and the selection of the lot by the plaintiff, the defendant was to convey to him; that the defendant had always been ready and willing, &c., but that the plaintiff had failed to signify which lot he would take.

Held, that the contract was not within the statute of frauds.

A parol contract for the sale of land is voidable, not void; and payment of the consideration may be such part performance as to take such a contract out of the statute of frauds.

Friday,
November 29.

APPEAL from the *Tippacanoe* Common Pleas.

PERKINS, J.—Suit for work and labor in building a house.

The defendant answered, as to \$600 of the demand sued for, that the work was done under a special parol contract,

by which it was to be paid for, to the amount of \$600, by the conveyance by the defendant to the plaintiff, of one of two designated lots in *Lafayette*, (giving their numbers,) the title to which was then in *Godlove S. Orth*, Esq., but which defendant was to procure and convey to plaintiffs when the work should be done, on the plaintiffs' signifying to him which one of the two lots he should procure and convey, they having the option; and the defendant averred that he had been at all times, and still was, ready, on the plaintiffs' choice being signified to him, to convey, &c.; but the plaintiffs had failed and refused, &c. But a short time elapsed after the work was performed before the suit was commenced.

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1861.

LINGLE
v.
CLEMENS.

A demurrer was sustained to this answer, on the ground that the contract was void by the statute of frauds. This is the question made in the case, and on this question, alone, we decide upon the ruling below. The ruling was as wrong as the proposition was inequitable.

The case of *Johnson v. Moore*, 1 Blackf. 253, is exactly in point. Ind. Dig., p. 15. Browne on the Statute of Frauds, lays down this proposition, at p. 125:

"The right of the vendee of land by verbal contract, to recover what money, or other consideration, he has paid, is clearly confined to those cases where the vendor has refused, or become unable, to carry out the contract, the plaintiff himself having faithfully performed, or offered to perform, on his part."

A parol contract for the sale of lands is voidable, not void. *Hadden v. Johnson*, 7 Ind. 394. It has been held that payment of the consideration may be such part performance as to take a parol contract for the sale of lands out of the statute. Perk. Prac. p. 659, and cases cited. Probably *Lingle* might have conveyed either lot, on the failure of the plaintiffs to designate. See *Wornack v. Jenkins*, post, 137.

Per Curiam.—The judgment is reversed, with costs. Cause remanded, with instructions to proceed according to this opinion.

G. O. Behm and *H. O. Behm*, for the appellants.

S. A. Huff and *R. Jones*, for the appellees.

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1861.

CAMPBELL v. GATES.

CAMPBELL

v.
GATES.

Ordinarily, a surety is liable to the creditor in the same manner, and to the same extent, as the principal debtor; but the surety may set up in defense any matter which ought, in equity, to go to his personal exoneration.

There is no valid reason why the engagement of a surety may not be founded upon a consideration variant from that which induced his principal to execute the agreement; and if such consideration be a condition subsequent, to be performed by the creditor, his failure to perform it would operate as a fraud upon the surety, and release him from all liability upon his engagement.

It is plainly competent for the surety to set up and prove such failure of consideration, because such defense is not in conflict with the legal effect of the contract.

Friday,
November 29.

APPEAL from the *Union* Circuit Court.

DAVISON, J.—The appellant, who was the plaintiff, sued *Adam Gates* and *John Gates*, upon a promissory note, for the payment of \$300. The note is dated *April 16, 1857*, and was payable on *December 25, 1858*, to one *Benjamin F. Strong*, who indorsed it to one *Deary Bowers*, who, without indorsement, assigned it to the plaintiff. *Adam Gates* was defaulted. The other defendant, *John Gates*, answered the complaint. His answer says, that he executed the note as the surety of *Adam Gates*; that at the time of its execution he was, also, the surety of said *Adam* upon another note for \$233, payable to one *John Honeyman*, and that *Strong*, the payee, when the note in suit was given, promised this defendant, in consideration that he would execute the same as surety, that he, *Strong*, would release him, defendant, or procure his release, from all liability on the note to *Honeyman*. It is averred that *Strong*, notwithstanding his promise, has failed and refused to release the defendant, or to cause his release, from such liability. And that since he became surety on the note given to *Strong*, *Honeyman* has recovered a judgment on the note given to him, against this defendant, which he has been compelled to pay, &c. To this answer, the plaintiff demurred; but his demurrer was overruled. And thereupon he replied, that before he fully purchased

said note, he called on the defendant and informed him of his intention to purchase it, and inquired of him if the note was valid, and if there were any set-offs against it; and further asked the defendant to execute to him, plaintiff, one note for \$220, and another note, for the residue thereof, to one *Deary Bowers*; but the defendant, although he refused to execute the new notes as requested, stated to the plaintiff that he had no set-off against the note, and that the same was valid; and the plaintiff, relying on said statement, purchased the entire interest in the note, wherefore, &c. The issues were submitted to a jury, who found for the defendant; and the Court, having refused a new trial, rendered judgment, &c. The causes for a new trial are thus assigned: 1. The verdict is contrary to law and evidence. 2. The charges asked by the defendant, marked Nos. 1 and 2, and given by the Court, are erroneous. 3. The Court erred in overruling the demurrer to the answer.

The charges referred to are as follows: 1. "The plaintiff having admitted the facts stated in the answer of *John Gates*, before he would be entitled to recover of *John Gates*, you should believe from the evidence that said *Gates* said or did something, to induce the plaintiff to purchase the note." 2. "If you believe that *Gates* said enough, in the conversation alluded to by *Elias Jarret*, to put the plaintiff on his guard, and require him to make further inquiry in regard to any defense that *Gates* might have to said note, you should find for the defendant." As the evidence is not in the record, we are unable to say whether these instructions are, or not, applicable to the case made by the proof. Nor can it be said that they are inconsistent with the issues made in the cause. We are not, therefore, authorized to adjudge them erroneous.

As has been seen, the answer to which the demurrer was overruled, sets up a contract between the payee of the note and the defendant, whereby the former, in consideration that the latter would become surety on the note, promised to release him, or procure his release, from certain liabilities to *John Honeyman*. This contract, it seems, was made at the time the note was executed; but was not reduced to writing.

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BERRY.

Hence it is argued that the contract, thus made, is not operative as a defense to the action, because it conflicts with the legal effect of the note. We are not inclined to adopt that construction. Ordinarily, a surety is liable to the creditor in the same manner, and to the same extent, as the principal debtor. But as an exception to this rule, the surety is allowed to set up in defense, any matters which ought, in equity, to go to his personal exoneration. Mr. *Burge* says: "If the contract of suretyship is, as between the creditor and the surety, subject to a condition, the surety is discharged if the condition be not performed." *Burge on Suretyship*, pp. 115, 116. Indeed, we perceive no valid reason why the engagement of the surety, who, as such, executes a written contract, may not be founded upon a consideration variant from that which induced its execution by his principal. And if, as in the case at bar, such consideration be a condition subsequent, to be performed by the creditor, his failure to perform it would evidently operate as a fraud upon the surety, and, upon that ground, release him from all liability upon his engagement. 2 Am. Lead. Cases, p. 262; *Pidcock v. Bishop*, 3 B. & C. 197. And it is plainly competent for the surety to set up and prove such failure of consideration, because it has been often adjudged that such defense is not in conflict with the legal effect of the contract. If these positions are correct, and we think they are, the Court, in overruling the demurrer, committed no error.

Per Curiam.—The judgment is affirmed, with costs.

Jno. F. Reid and *J. F. Gardner*, for the appellant.

B. F. Claypool and *N. G. Trusler*, for the appellee.

THE PRESIDENT AND DIRECTORS OF THE OHIO AND MISSISSIPPI
RAILROAD COMPANY *v.* HUCKLEBERRY.

Friday,
November 29.

APPEAL from the *Jennings* Common Pleas.

Per Curiam.—Suit by *Huckleberry* against the company,

for killing stock upon the road, where it was not fenced. Nov. Term, Issue; trial by the Court; finding and judgment for the 1861.
plaintiff.

The only question raised is, as to the sufficiency of the evidence to sustain the finding. Having examined the evidence, we are of opinion that it tends to make out every material fact necessary to the plaintiff's recovery.

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OF
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BUTTER-
WORTH.

The judgment is affirmed, with costs.

Theodore Gazlay and Lucius C. Bingham, for the appellants.

James H. Varoter, for the appellee.

THE BOARD OF COMMISSIONERS OF WARRICK COUNTY v. BUTTERWORTH and Others.

17 129
155 587

A. and B. filed their claim before the *Board of County Commissioners*, for work done in the erection of two stone piers for a bridge. A contract was given in evidence, which, in the introductory part of it, purported to be made between *A. and B.*, of the first part, and "*P.*, agent of the counties of *S. and W.*," of the other part. After describing the work to be done, &c., the contract provided that the said *P.* should pay the stipulated price in county orders, &c.

Held, that as the agreement bound *P.*, and not the counties for which he assumed to be acting, to pay for the work, an action could not be maintained upon it against the counties, without the averment of other facts; as that the contract was accepted and adopted by the counties as theirs.

Held, also, that the failure of the board to have made the preliminary surveys, &c., required by the act of 1855, (Acts 1855, pp. 13, 19,) before letting the contract for the bridge, did not render their acts void, or affect their liability to pay for the work.

APPEAL from the *Vanderburg* Circuit Court.

Friday,
November 29.

HANNA, J.—The appellees filed a claim before the *Board of Commissioners of Warrick County*, for building two piers for a bridge, to be erected across *Pigeon* creek, which is the boundary line between that county and *Spencer*. The claim was not allowed. The present appellees appealed to
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Nov. Term, 1861. the Circuit Court, and from thence took a change of venue to Vanderburg county. Trial; and judgment for said claimants.

THE BOARD OF COMMISSIONERS OF WARRICK CO. v. BUTTERWORTH. It is urged that errors occurred in divers particulars; *first*, in the admission of evidence. Two written agreements were introduced by the plaintiffs. These writings purport, in the first part thereof, to be made by the appellees, of the first part, and "*Nathan Pyeatt*, agent of the counties of *Warrick* and *Spencer*, of the second part," and provide that said parties of the first part were, in a limited time, to erect two stone piers, at a named place, for a fixed price, and in a given manner, and the "*said Pyeatt* is to pay the parties of the first part the sum," &c., "in county orders on each of said counties of *Warrick* and *Spencer*." Signed, "*Earnest Cook*, *William Butterworth*, *Nathan Pyeatt*." The ground of objection was, that the instruments were not between the parties to the suit; in other words, were not the contracts of the defendant. This language is used in a late work:

"It has been regarded as an established principle, that no person is held to be the agent of another in making a written contract, unless his agency is stated in the instrument itself, and he therein stipulates for his principal by name." 1. Par. on Cont. 48, citing *Stackpole v. Arnold*, 11 Mass. 27; *Long v. Colburn*, *id.* 97; *Magill v. Hinsdale*, 6 Conn. 464; *Hancock v. Fairfield*, 30 Maine, 299. See, also, *Deming v. Bulfinch*, 1 Blackf. 241, and note; *id.* 189; 2 Ind. 327. "But, (says the author,) the rule is qualified, if not contradicted, by authority of much weight, and we do not regard it of great force except in cases of sealed instruments;" citing 2 Smith's Leading Cases; *Thompson v. Davenport*, and note; and *Fenley v. Serant*, 5. Sandf. 101. In the latter case, the conclusion arrived at, appears to have been, that when a contract is reduced to writing, and an action is brought upon the said writing, no other persons can be made parties than those therein named; but when a right of action exists, independent of the writing which is used merely as evidence toward establishing that right, then the party having the legal interest, may sue or be sued, though not named in said writing. If this was a private contract, the weight of the authorities referred to is to the effect, that in suing upon such written contract,

Pyeatt would be the proper defendant, in an action by the party of the other part. Nov. Term,
1861.

The suit here is not upon the instrument in writing, but is in the following form: THE BOARD
OF
COMMISSION-
ERS OF
WARRICK Co.
V.
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WORTH.

"THE BOARD OF COM'S OF WARRICK COUNTY, DR.
To BUTTERWORTH & COOK,

*1859. To building two stone piers in <i>Pigeon</i> creek, and furnishing part of materials.	
Whole amount,	\$1,165.00
"Cr. By order,	200.00
	<hr/>
"Balance due,	\$965.00
(Signed,) "BUTTERWORTH & COOK."	

There was no other pleading filed, either before the board, or in the Circuit Court; nor does any objection appear to have been made to the sufficiency of this.

If the written agreements offered, were intended by those who executed them to be obligatory upon the county, then it is insisted that as contracts of a public nature, or affecting the public interest, they should be governed by a different rule from that in regard to private contracts, and should be considered, and treated, as the contracts of the said boards of commissioners of said counties, although not entered into by said county authorities, nor by said *Pyeatt*, in the names of said authorities. Legal authorities to sustain this proposition are not brought to our notice, nor do we know of any that will fully sustain the same.

It will be observed, that the writings offered in evidence disclose the fact that *Pyeatt* was an agent, and that he was the agent of certain counties named, but binds him to make the payments, and not the said named principals. We are therefore, we repeat, of the opinion that an action could not be maintained upon the said agreements against the principals, by merely declaring upon the agreements, without averring other facts. Could there be facts, other than those contained in the writings, that would make the defendants liable, and if so, could evidence thereof be given without pleading the said facts? For instance, the acceptance and ratification of the contracts, as being those of the county, by the proper

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WORTH.

authorities, is relied on, but not pleaded. If, under the circumstances, such proof was legitimate, then the writings could be properly received, as the Court would not, ordinarily, control the order of introducing the testimony of a party.

Such facts might exist, and we are of opinion, considering the statutes under which the proceeding was instituted, might be given in evidence, together with the said writings, to sustain the said claim. Whether the evidence was sufficient, is another question. We have examined the evidence, and believe that it so far tends to show the adoption, and perhaps ratification, of said contracts as to justify the verdict, so far as that point is involved.

The Court refused to instruct the jury that the contracts made by *Pyeatt* were not binding upon the defendants; but instructed, that if defendants adopted said contracts, and plaintiffs performed their part thereof, they were entitled to recover.

These rulings are complained of. We do not think there was any error committed therein, unless the appellant is correct in the next proposition advanced, which is, that in the whole matter, the defendants acted without authority of law, and, as a consequence, their acts are void.

We had, at the date of these contracts, &c., certain statutes, prescribing that in the erection of a bridge, certain preliminary surveys, &c., should be made and reported, and adopted by the board, and contracts let in pursuance thereof. Acts 1855, pp. 18, 19.

There is nothing in the record showing that such surveys, &c., had ever been made; indeed, the inference is pretty strong, from statements in the orders appointing *Pyeatt* to superintend said building, that no such surveys had been made.

Could said board bind the county, by making, or adopting contracts made, without regard to said statutes?

It has been already decided, that to give the board of commissioners jurisdiction to act, in ordering a highway to be opened, their record should show that the statute, under which they acted, had been complied with. *Rhode v. Davis*, 2 Ind. 53.

Under the present Constitution, and statutes, the board of county commissioners is, to some extent, a corporation, with powers incident thereto, and prescribed by statute, as well as limited judicial powers. If, in the case at bar, the board had caused surveys, &c., to be made, by a competent person, and had adopted the same, we do not see but that the persons for whom they acted, namely, the inhabitants and taxpayers of the county, would have been bound by such action; although the same might have involved a very great error of judgment. But they acted without such surveys and estimates; we are not informed whether with even ordinary prudence and judgment. The evidence would appear to indicate the negative; for it is, that the piers "were built according to the contracts," and that the board refused to pay for the work, "because it tumbled down before it was fully received." Whether such destruction resulted from a bad site, or an improper location of the piers, or because they were not of proper proportion, is not shown. The question is, therefore, fairly presented, should the statute have been complied with, as to a survey, &c.?

We are inclined to hold, in this case, that the defendants were liable, notwithstanding the failure to make a survey, before authorizing the work. It is not necessary for us to decide, whether the statute should, in every instance that might arise, be viewed as merely declaratory of the duty of the commissioners.

Per Curiam.—The judgment is affirmed, with 3 per cent. damages and costs.

Conrad Baker and *J. S. Moore*, for the appellants.

James G. Jones, *J. E. Blythe* and *A. L. Robinson*, for the appellees.

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1861.

CAMPBELL
v.
GOULD.

CAMPBELL v. GOULD and Another.

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Suit by an assignee of a promissory note, against his assignor, averring the insolvency of the maker. It appeared in evidence, that the maker of the

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1861.

CAMPBELL
v.
GOULD.

Friday,
November 29.

note was a householder of the county, and that his property was worth only two hundred dollars.

Held, that property within the exemption of three hundred dollars should, *prima facie*, be considered as beyond the reach of the law.

APPEAL from the *Porter* Common Pleas.

HANNA, J.—Suit by the assignees of a promissory note, against the assignor. Averments that suit had been instituted, judgment recovered, mortgaged property sold, and return of no other property found; and, also, that the makers were insolvent, at, and continually after, the maturity of the note.

At the first term of Court, after the maturity of the note, a judgment was recovered against one of the makers, and the cause continued for about six months, as to the other, for publication, before judgment, as to him. No execution issued on the first, until after the second judgment. No excuse was shown for the delay. This was, *prima facie*, a want of diligence. The proof, on the second point, was, that the defendant was a householder of the county, and the head of a family; that his property was worth only two hundred dollars; and that when the execution did issue, he took the benefit of the exemption act. The other defendant was a non-resident. Was this sufficient evidence of insolvency, to dispense with diligence in prosecuting the suit?

The Constitution provides, Art. 1, § 22, that, "The privilege of the debtor to enjoy the necessary comforts of life, shall be recognized by wholesome laws, exempting a reasonable amount of property from seizure, or sale, for the payment of any debt," &c. In pursuance of this provision, the Legislature enacted, "That an amount of property, not exceeding in value three hundred dollars, owned by any resident householder, shall not be liable to sale on execution," &c. 2 R. S., § 1, p. 337.

Thus it will be seen, that property to the value of the sum named, is exempt from liability to a forced sale. Although it may be said, perhaps, that the debtor must claim the exemption, avail himself of this right, and that he may by express acts, or, even implication, waive it; yet we can not perceive but that the property, when within the exemption.

should be *prima facie*, for the purposes of a suit of this character, considered as beyond the reach of the regular process of the Court. In other words, keeping in view the fundamental law, and the statute, the legal presumption would be, that there was a necessity for such laws, and that the citizen would avail himself of the privilege thereby extended to him, to reserve the amount of property indicated, for the purpose named. That is, that such laws are but an expression of the desire of the citizens to retain the "necessary comforts of life," which may be drawn from the possession of that amount of property, rather than devote the same to the payment of debts.

Per Curiam.—The plaintiffs having recovered below, the judgment is affirmed, with 3 per cent. damages and costs.

James Bradley and D. J. Woodward, for the appellant.

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1861.
INDIANAPOLIS AND
CINCINNATI
RAILROAD CO.
v.
RENNER.

THE INDIANAPOLIS AND CINCINNATI RAILROAD COMPANY v.
RENNER.

Jurisdiction over the person of the defendant, may be conferred by pleading to the merits without raising the question; but no consent of parties can confer jurisdiction over the subject matter of a suit.

Actions against railroad companies for injuries to animals, must, under the statute, be brought in the county where the injury was done, and in the absence of proof upon this subject, the jurisdiction of the Court over the subject matter of the case is not made to appear.

APPEAL from the *Dearborn* Circuit Court.

Friday,
November 29.

WORDEN, J.—Suit by *Renner*, under the statute, against the company, for killing a cow upon the road, where it was not fenced. Suit was brought before a justice of the peace, and taken by appeal to the Circuit Court, where there was a verdict and judgment for the plaintiff; a new trial being applied for, and denied.

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1861.

HIGHNOTE

v.

VICKERY.

The point made is, that the verdict is not sustained by the evidence, and particularly, that it did not appear that the cow was killed in *Dearborn* county. We have looked into the evidence, and find that this fact was not proven, nor was there any evidence from which it might, legitimately, have been inferred. But the appellee insists that as this was a question of jurisdiction, the fact that the cow was not killed in *Dearborn* county, if such were the fact, should have been pleaded in abatement; otherwise, it was waived. The law on the subject requires the suit to be brought in the county where the injury was done. Acts 1859, p. 105.

Under this statute, unless the injury was done in *Dearborn* county, the Courts thereof had no jurisdiction of the subject matter. Jurisdiction over the person of the defendant, may be conferred by pleading to the merits without raising the question. Not so, however, in respect to jurisdiction over the subject matter. No consent of parties can confer such jurisdiction. The complaint correctly alleged that the injury was done in *Dearborn* county, and the statutory denial put in before the justice, put in issue, not only the killing, but that it was done in that county. The burden of proof, on this point, lay on the plaintiff.

Per Curiam.—The judgment is reversed, with costs. Cause remanded, &c.

J. S. Scobey, for the appellant.

E. Dumont and *J. T. Brown*, for the appellee.

HIGHNOTE v. VICKERY and Others.

Friday,
November 29.

APPEAL from the *Morgan* Circuit Court.

Per Curiam.—Suit commenced before a justice. Judgment for defendants. Appeal by plaintiff. Judgment in the Circuit Court for plaintiff, for two dollars damages, and two dollars costs. Motion, by the plaintiff, that judgment be

entered in his favor, for full costs. Motion overruled. The record does not contain the evidence. We are of opinion that the motion, as to costs, should have been sustained.

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The judgment, as to costs, is reversed. Cause remanded, &c. *C. C. Nave, and Burns & Glesner*, for the appellant.
William R. Harrison, for the appellees.

WORNACK
v.
JENKINS.

WORNACK v. JENKINS.

Where a note is made payable in specific articles, the creditor, on the coming due of the note, may designate a place of delivery, and notify the debtor thereof, and he will then be bound to make delivery at that place; but if the creditor neglects to designate a place of delivery, then the debtor must, at once, after the note has become due, select a proper place, within the reason and spirit of the contract, notify the creditor thereof, if his locality is known, and make delivery at that place, and thus discharge the debt.

APPEAL from the *Decatur* Circuit Court.

Friday,
November 29.

PERKINS, J.—Suit upon a note of the following tenor:

“JANUARY 1, 1859.

“One month after date, I promise to pay to the order of *William Manes*, four hundred and twenty dollars, in good assorted lumber, at one dollar and twenty cents per hundred, to be delivered at *St. Paul*, at such places as said *Manes* may designate, for value received.

(Signed,) “A. H. WORNACK.”

The note was indorsed to the plaintiff. The appellant raises no question, in his brief, upon the sufficiency of the complaint, and we shall raise none. The note, it will be observed, is for the payment of a debt in specific articles, which articles were to be delivered to *Manes*' order, at such places as he should designate, within certain limits. Neither *Manes*, nor his assignee, designated any place, or places, for

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WORNACK
v.
JENNINS.

the delivery of the lumber, and yet *Wornack* is sued for its non-delivery; and the question is, can the action be maintained? This question may be answered in considering the more general one, as to what was the duty of the maker of the note in question, on its becoming due. His ultimate duty was to pay the note by the delivery of the articles specified, at a legal place, or by paying the amount of it in money to the holder. The failure of the payee, or holder, to give notice of a place for the deposit of the specific article, did not excuse the maker from paying the note, because such notice was not a condition precedent to its payment. This is settled by the cases of *Gilbert v. Danforth*, 2 Seld. 585; and *Livingston v. Miller*, 1 Kernan, 80. The right of designating the place is a privilege, which is waived by the neglect to exercise it, and such waiver leaves the note payable in specific articles, at a place to be designated by the debtor, which must be a reasonable one, and, in a case like that at bar, within the specified limits; except in case of rent, which, when the payee fails to exercise an option given by the lease, as to designating a place of payment in specific articles, becomes payable on the premises.

But, in case of a contract payable in specific articles, where the debtor has the right of selecting the place for delivery, and desires to make a delivery which shall vest the property in the creditor, and put it at his risk, and thus discharge the debt, reason would seem to dictate that the creditor should have notice of the place of delivery, so that he might take measures for the security and preservation of the property; and such seems to be the law. *Peck v. Hubbard*, 11 Vermont, 612; 2 Par. on Contracts, pp. 161, 163, note *x*.

In such a contract as that in the case at bar, the creditor, before, or on the coming due of the note, may designate the place of delivery, and notify the debtor thereof. The debtor must then make delivery at that place. But, if the creditor neglect to designate to the debtor a place for delivery, then the debtor may, at once, after the note has become due, select a proper place, within the reason and spirit of the contract, notify the creditor thereof, if his locality is known, and make delivery at that point, and thus discharge the debt. If the

locality of the creditor was not known, that fact might furnish an excuse for a failure to give notice. Nov. Term,
1861.

Per Curiam.—The judgment is affirmed, with 1 per cent. damages and costs. LOUCHHEIM
v.
GILL.

J. S. Scobey, for the appellant.

Oscar B. Hord and James Gavin, for the appellee.

LOUCHHEIM v. GILL.

Suit to recover the possession of personal property. Answer: 1. General denial. 2. Right of possession in the defendant, by virtue of a chattel mortgage from the plaintiff, but without setting out a copy of the mortgage. Reply: 1. That the plaintiff was, at the time of executing the mortgage, of weak and imbecile mind, and so far insane as to be incapable of understanding the nature of the same, and was unable and unfit to do business, and incapable of assenting to any contract. 2. That said mortgage was procured by fraud, in this, that the defendant fraudulently and falsely represented to the plaintiff, that said mortgage was a promissory note, and he being entirely uneducated, and incapable of judging of the effect of a mortgage, and relying upon said false and fraudulent representations, executed said mortgage, &c.

Held, that the first reply was good.

Held, also, that the second reply did not show such a misrepresentation of facts as would vitiate the mortgage.

Held, also, that though the second paragraph of the answer was bad, for not setting out the mortgage, yet the defendant was entitled, under the general issue, to prove that the right of possession was in him.

APPEAL from the *Elkhart* Common Pleas.

*Friday,
November 29.*

HANNA, J.—*Gill* mortgaged certain personal property to the appellant and his brother, to secure the payment of a debt, by a fixed day. *Gill*, at the maturity of the debt, failed to pay, and appellant, who had acquired, by assignment, the interest of his brother in said mortgage, so far as it could be thus transferred, took possession of said property by virtue of the same. *Gill*, thereupon sued, and had judgment for possession. The answer, in the second paragraph, set up a claim under the mortgage, but did not set the

Nov. Term, same forth, nor, so far as the record shows, file a copy thereof.
1861. The first paragraph was a denial. Reply: fraud, and want
LOUCHHEIM of capacity to execute a mortgage, &c.

v.
GILL.

There was a demurrer to the second and third paragraphs of the reply, which was overruled. This ruling raises the first question. The third paragraph, we think was good. It avers, that the plaintiff was, &c., at, &c., "of weak and imbecile mind, and so far insane as to be incapable of understanding the nature of said instrument, and unable and unfit to do business, and incapable of assenting to any contract."

As to the second paragraph, we are of opinion that it was not sufficient. It avers that the execution, &c. "was obtained by the fraud and misrepresentation of said defendant; that he fraudulently and falsely represented to said plaintiff that said mortgage was a promissory note, and the plaintiff relying, &c. signed the same; that he, the said plaintiff, being entirely uneducated, was and is incapable of judging and knowing the effect of a mortgage of any kind." It appears to us that this pleading does not sufficiently show that there was such a misrepresentation of facts as would vitiate the writing. The gist of the pleading is, that there was a misrepresentation of the legal effect of the instrument, which ought to render it null, because of the plaintiff's want of education. Such an objection, alone, to the binding obligation of a writing is not available.

But although the paragraph of the reply was bad, yet as the paragraph of the answer to which it was pleaded was also bad, the demurrer not only reached to the vicious reply but also the insufficient answer, and should have been sustained to such part of the answer, for the failure to properly plead the writing upon which it was founded. This would leave the defendant to rely upon his general denial, and such evidence as could be offered under it. The right of possession in himself, by virtue of the mortgage was his defense, by the evidence. Could he avail himself of that line of defense? If not, we need inquire no further.

The statute is, 2 R. S., p. 45, that under a mere denial of any allegation, no evidence shall be introduced which does

not tend to negative what the party making the allegation is bound to prove. Nov. Term,
1861.

The plaintiff had to show a right of possession in himself. Certainly, proof that such right was in the defendant would negative that allegation. The evidence was therefore admissible, as to defendant's rights under the mortgage; but although thus admissible, we can not disturb the judgment, on the evidence. It is conflicting, and tends to sustain the verdict.

STEVENS
v.
HURT.

Per Curiam.—The judgment is affirmed, with costs.

J. H. Baker and J. A. Liston, for the appellant.

STEVENS v. HURT and Another.

A judgment directing the sale of real estate on a vendor's lien, in the first instance, unless the vendee has no personal property out of which the judgment might be made, is erroneous.

APPEAL from the *Boone* Common Pleas.

Friday,
November 29.

HANNA, J.—Suit on a note, and to foreclose a mortgage; and, also, on a note which was not secured by said mortgage, but which, it is averred, was given for a part of the consideration money of the said land mortgaged. There was a judgment for the amount of both notes, and that the equity of redemption be foreclosed, and the land sold to satisfy said judgment. There was no averment of insolvency, or a want of other property, &c. See *Scott v. Crawford*, 12 Ind. 410.

Per Curiam.—The judgment was erroneous, as to the amount of the note not included in the mortgage; and, therefore, so much of it is reversed. In all other respects, the judgment is affirmed, at appellees' costs.

O. S. Hamilton, for the appellant.

A. J. Boone, for the appellees.

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1861.

SILVERS v. THE JUNCTION RAILROAD COMPANY.

SILVERS
v.
THE
JUNCTION
RAILROAD Co.

Suit to recover certain real estate, which the plaintiff had been induced to subscribe to the stock of the company, through the false and fraudulent representations of her agent. The complaint averred that the plaintiff was ready and willing, and offers to bring said stock into Court, to be disposed of in such manner as the Court may direct. The Court below, on motion of the defendant, ordered the plaintiff to furnish the defendant with inspection of the certificates of stock by him subscribed, the motion being founded on the pleadings alone, and there being no evidence of notice to the plaintiff to produce. For the failure of the plaintiff to comply with this order, the cause was dismissed, without prejudice.

Held, that §§ 305 and 306 of the Code (2 R. S., p. 97), relate to papers which the adversary party desires to use in evidence, and not to papers of which a mere inspection is demanded, and which are set forth or referred to in the pleadings.

Held, also, that at common law the rule is, that where the form of action, or the pleadings, gives the party notice to be prepared to produce a written instrument, no other notice to produce it is necessary; and §§ 305 and 306, *supra*, were not intended to change this rule.

Held, also, that §§ 305 and 306, *supra*, construed with § 363 (2 R. S., p. 120), authorize the Court, for disobedience of an order to produce papers, either to "allow parol evidence to be given of their contents," or "to exclude the evidence, and punish the party refusing," or, to dismiss the suit without prejudice.

Friday,
November 29.

APPEAL from the *Hancock* Circuit Court.

DAVISON, J.—*Silvers*, who was the plaintiff, brought this action against the railroad company, alleging in his complaint, that in *September*, 1853, he was induced by the false and fraudulent representations of said company, made through her agent, one *Edwin McArthur*, to subscribe 650 shares of her capital stock; and, in payment therefor, to convey to her certain real estate, which is described in the complaint, and which was then, and still is, of the value of \$32,561. The representations of which the plaintiff complains, as being false and fraudulent, are thus alleged: 1. That said company, by her agent, represented such capital stock to be worth 90 cents on the dollar, and that if the plaintiff would subscribe, he would receive dividends on his stock as soon as the railroad was finished, and that the same would be finished within two years. 2. That the *Hamilton and Dayton Railroad*

had in the *Junction Railroad Company*, stock, then paid for, to the amount of \$200,000. 3. That said railroad, to be established by the company, would be a through road from *Indianapolis* to *Cincinnati*. It is averred that the plaintiff, on *January 1*, 1855, when he discovered that said representations were false and fraudulent, applied to the president and directors of the company, then in session, and offered to relinquish to them the stock, by him subscribed as aforesaid, and demanded a reconveyance of said land, but they refused, &c.; and that he is ready and willing, and offers to bring the same stock into Court, to be disposed of, when, and in such manner as the Court may direct. The relief prayed is, that the conveyances by him made to the defendant be set aside, and that the lands described be reconveyed, &c., and for general relief, &c. Defendant demurred generally to the complaint, and severally to the alleged fraudulent representations; but her demurrers were overruled, and she excepted.

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1861.

SILVERS
v.
THE
JUNCTION
RAILROAD CO.

The record contains a bill of exceptions, which shows that the defendant, upon the overruling of the demurrers, viz., on *August 13*, 1856, moved the Court for an order on the plaintiff, directing him to furnish the defendant with the inspection of the certificates of the stock by him subscribed, "by *Friday* the 15th of the same month, in the afternoon;" which motion was founded on the pleadings alone, (there being no evidence of notice to the plaintiff to produce the certificates,) and was, on said pleadings, allowed, and such inspection ordered. And afterward, on *Friday* evening, *August 15*, the defendant moved that the plaintiff then be required to comply with said order, and the plaintiff failing to comply, and showing no reason against complying, the Court thereupon, on the defendant's motion, and for such non-compliance alone, dismissed the suit, without prejudice, &c., and rendered final judgment against the plaintiff.

The errors assigned by the appellant, are as follows:

1. The Court erred in making the order for inspection, &c.
2. It was error to dismiss the suit, on account of his non-compliance with the order. And, for cross error, the appellee assigns the following: "The Court erred, in overruling

Nov. Term, 1861. **SILVERS** v. **THE JUNCTION RAILROAD CO.** the demurrers to the complaint. The appellant, in support of his assignments of error, refers to §§ 305 and 306, of the Practice Act. These sections provide, 1. That the Court, or judge thereof, may, upon motion, compel by order, either party to produce, at or before the trial, any book, paper or document, in his possession or power; the order may be made, upon application of either party, upon reasonable notice to the adverse party, or his attorney. If not produced, parol evidence may be given of their contents. 2. The Court, or judge thereof, may, under proper restrictions, upon due notice, order either party to give the other, within a specified time, an inspection, and a copy of any book, or part thereof, paper or document, in his possession, or under his control, containing *evidence* relating to the merits of the action, or the defense therein; if compliance with the order be refused, the Court, on motion, may exclude such evidence, or punish the party refusing, or both. 2 R. S., pp. 97, 98. If the sections thus recited apply at all, to the question under discussion, the ruling of the Court cannot be maintained, because the Court is not authorized to grant the order contemplated by either section, in the absence of proof that notice had been served on the adverse party. It is, however, contended, that these sections relate to papers which the adversary party desires to use in evidence, but not to papers of which a mere inspection is demanded, and which are set forth, or referred to, in the pleadings. We are inclined to favor this construction. At common law, the rule is, that "where the form of action, or the pleadings, gives the party notice to be prepared to produce a written instrument, no other notice to produce is necessary." *Hammond v. Hopping*, 13 Wend. 505; *Hardin v. Kretsinger*, 17 Johns. 293; 2 Phil. Ev. 4 Am. Ed. p. 539, note 461. The enactments in question, were not, in our judgment, intended to change the common law rule. As has been seen, the plaintiff, in his complaint, after alleging a tender of his railroad stock to the defendants, and their refusal to rescind the contract, says, "that he is ready and willing, and offers, to bring the same stock into Court, to be disposed of when, and in such manner, as the Court may direct." Now, as the plaintiff had thus

shown himself ready to place the stock at the disposal of the Court, there seems to be no reason why the order for its production, was not, of itself, sufficient notice to produce it. This, it seems to us, is not a case in which actual notice in writing to produce papers is required, because, here, the certificates of stock, when produced, were not intended to be used as evidence, but simply to allow the defendants an inspection of their contents. And the plaintiff having, in this instance, offered no excuse for his non-compliance, other than the want of such notice, it must be intended that the certificates were, at the time designated in the order, in his possession, and that he was then ready to produce them.

The second error assigned, relates to the action of the Court, in dismissing the suit. Sections 305 and 306, to which we have referred, point out the consequences of failing to comply with an order of the Court, made under them. These provisions, as we have seen, do not authorize a dismissal of the suit. But there is another section, which says, "An action may be dismissed without prejudice, by the Court, for disobedience, by the plaintiff, of an order concerning the proceedings in the action." 2 R. S., § 363, p. 120.

Now, the three sections thus referred to, are not in conflict, and may be so construed that each may stand and be effective. And this being done, the result is, that the Court may, for disobeying an order to produce papers, &c., allow 'parol evidence to be given of their contents,' or may "exclude the evidence, or punish the party refusing," or, the plaintiff having disobeyed the order, his suit may be dismissed, without prejudice. If this construction be correct, and we think it is, the Court, in its dismissal of the suit, committed no error.

As the judgment in this case must, over the appellant's assignments of error, be affirmed, the cross error will not be noticed.

Per Curiam.—The judgment is affirmed, with costs.

D. McDonald, for the appellant.

Cal'eb B. Smith, for the appellee.

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THE STATE, on the relation of FRISBIE *v.* HART and Others.

MITCHELL,

v.

PARKHURST.

APPEAL from the *Spencer* Circuit Court.Friday,
November 29.*Per Curiam*.—This case was here at the *May* term, 1859.

12 Ind. 424. After it was returned to the inferior Court, the answer was withdrawn, and separate demurrers filed to each of the several breaches assigned in the complaint; which were sustained as to six of them, but overruled as to the fourth, which averred the collection of \$87.20, and a failure to pay over the same. As to that breach, there was a denial. Trial thereon, and judgment for the plaintiff for \$2.10, and against the relators for costs.

It is urged that evidence of payment should not have been received under the issue. Whether it was correctly received, or not, we need not inquire, as no objection to its introduction appears.

The breaches setting out a failure to levy are, in our opinion, sufficient. The Court therefore erred in the ruling on the same.

Was the judgment right as to the costs? No motion was made relative thereto, and consequently no question thereon is presented.

The judgment is reversed, with costs. Cause remanded, &c.

H. G. Barkwell, for the appellant.

Pitcher and Veatch, for the appellees.

MITCHELL and Another *v.* PARKHURST, Administratrix of MITCHELL.

A. died intestate, and without issue, leaving his widow, and his father and mother, surviving. His estate consisted of \$334 of personal property, and real estate valued at \$1,800, which had been conveyed to him by his father in consideration of natural love and affection. Two thirds of the land was sold on petition of the administratrix, to pay debts, leaving one third to the widow; and the surplus after the payment of debts, and

\$300 to the widow, was, by order of the Court, distributed, one fourth to the father and mother, and three fourths to the widow. Nov. Term, 1861.

Held, that under § 7, of the act regulating the apportionment of estates, &c., (1. R. S., p. 249,) the father was entitled to the reversion of the land, subject to the rights of the widow therein; which means her ordinary right to one third of the real estate left by her deceased husband. MITCHELL v. PARKHURST.

Held, also, that the overplus remaining after the payment of debts, being of the proceeds of the sale of the land, belonged to the father, because, in the absence of such a sale, he would have been entitled to the entire two thirds, as a reversioner in fee simple.

APPEAL from the *Johnson* Common Pleas.

Friday,
November 29.

DAVISON, J.—The facts of this case are these: *Noah Mitchell* died in *October*, 1858, intestate, leaving *Nancy Mitchell*, now *Nancy Parkhurst*, his widow, who was duly appointed administratrix of his estate. And having left no children, or their descendants, his widow and his father and mother, the said *John D.*, and *Maria Mitchell*, became his only heirs. The whole of the decedent's estate consisted of personal property, worth \$334.50, and real estate valued at \$1,800. The real estate was given to the decedent by his father, *John D. Mitchell*, in consideration of natural love and affection. Two thirds of it was appraised at \$1,200, and sold for the payment of debts at \$800, leaving one third to the widow. From the report of the administratrix, made at the *April* term, 1859, of said Court, it appears:

That there came to her hands, for the payment		
of debts, the above amounts of \$334.50, and		
\$800, making in all	- - - -	\$1,134.50
Of which there was taken by the widow, \$300.00		
And paid on debts against the estate,	- 719.33	\$1,019.33
Leaving, for distribution to the heirs	- -	\$ 115.17

Which was thus distributed by the Court: To the appellants, *John D.*, and *Maria Mitchell*, one fourth, \$28.79½, and to the widow \$86.37½. The error assigned is, that the Court, in its order of distribution, adjudged to the appellee \$26.37½, when, in point of law, "she was not entitled to any thing." The "act regulating the apportionment of estates," contains these provisions:

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1861.

MITCHELL
v.
PARKHURST.

"§EC. 7. An estate which shall have come to the intestate by gift or by conveyance, in consideration of love and affection, shall, if the intestate die without children or their descendants, revert to the donor, if living at the intestate's death, saving to the widow or widower, however, his or her rights therein."

"SEC. 15. Every rule of descent or distribution prescribed by this act, shall be subject to the provisions made in behalf of the surviving husband or wife of the decedent."

"SEC. 17. If a husband die testate, or intestate, leaving a widow, one third of his real estate shall descend to her in fee simple, free from all demands of creditors," &c.

"SEC. 25. If a husband or wife die intestate, leaving no child, but leaving a father and mother, or either of them, then his or her property, real and personal, shall descend, three fourths to the widow or widower, and one fourth to the father and mother jointly, or to the survivor of them. *Provided*, That if the whole amount of property, real and personal, does not exceed \$1000, the whole shall go to such widow or widower." 1. R. S., pp. 249, 250, 251.

It is said, in argument, that the Common Pleas, in making the distribution, based its decision upon § 25, just recited; while, on the other hand, it is insisted that the case made by the record falls within the provisions of § 7. The latter position seems to be correct, because that section is the only one in the entire enactment that relates to cases of this sort. The intestate having derived title to the real estate of which he died seized by conveyance from his father, founded upon the consideration of "natural love and affection," the father was entitled to the reversion, subject to the rights of the widow. What were her rights? The words used are, "her rights therein." These evidently mean her ordinary right to one third of the real estate left by her deceased husband, whether he has died testate or intestate. And the residue two thirds, or the proceeds thereof, remaining after its legal application to the payment of the intestate's debts, "revert to the donor." How then stands the case before us? The widow received one third of the real estate, and of the personalty, which amounted to \$334.50, she kept \$300, leavin

\$34.50 of the personal estate to be applied to the payment of debts. But these debts were of the aggregate amount of \$719.33, which, after deducting the \$34.50 of personalty, first applicable to their payment, were reduced to \$684.83. For the payment of this balance of the debts, two thirds of the real estate was sold, its proceeds amounting to \$800; which, after paying the \$684.83, the debts remaining unpaid, leaves an overplus of \$115.17. Now, it is evident that this overplus, being of the proceeds of the sale, of right belongs to the intestate's father; because, in the absence of any such sale, he would have been entitled to the entire two thirds, as a reversioner, in fee simple. It follows, that the distribution made to the widow was erroneous, and the judgment must, therefore, be reversed.

Per Curiam.—The judgment is reversed, with costs. Cause remanded, &c.

Williams, Overstreet, and Hunter, for the appellants.

Samuel P. Oyster, for the appellee.

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POPHAM
v.
SNIDER.

POPHAM v. SNIDER.

APPEAL from the *Kosciusko* Circuit Court.

Friday,
November 29.

Per Curiam.—In this case, no question is raised except as to the correctness of the ruling of the Court below on a motion for a continuance. On the supposition that the ruling was erroneous, the error was waived, as no new trial was asked for. *Kent v. Lawson*, 12 Ind. 675.

The judgment below is affirmed, with 5 per cent. damages and costs.

H. C. Newcomb and J. Tarkington, for the appellant.

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THE BOARD
OF COMMISSIONERS OF
FOUNTAIN CO.
V.
COATS.

THE BOARD OF COMMISSIONERS OF FOUNTAIN COUNTY v. COATS.

It appears from the record, that one *A.*, judicially known to the Supreme Court to have been the judge of the Court below, began the term of the Court at which this case was tried, and made rulings in the case. Afterward, and before the day of the trial, the record shows that the Court was held by one *B.*, "acting judge of said Court," but contains no record of the manner or purpose of his appointment as such. A motion for a new trial having been overruled, thirty days were given to prepare a bill of exceptions, which was prepared within the time limited, and signed by *B.*, as judge.

Held, that in the absence of evidence, or judicial knowledge, of the right of *B.* to sign the bill of exceptions, as judge, such right can not be presumed to exist.

Held, also, that it should appear from the record, or be within the judicial knowledge of the appellate Court, that the inferior tribunal before which a case was tried, had authority to act in the premises, either legally or in fact; and as it does not appear so in this case, the whole proceedings were without law, and can not be maintained.

Friday,
November 29.

APPEAL from the *Fountain* Common Pleas.

HANNA, J.—*Coats* sued the appellants on a special contract, averring performance on his part. Answer: denial, failure to perform, &c. Trial; verdict and judgment, over a motion for a new trial, for plaintiff.

The record before us shows that the term of the Court at which the case was tried was begun by *Tyler*, whom we judicially know to have been, at that time, judge of said Court, and that he presided and made rulings in this case. Afterward, and before the day of the trial thereof, an entry shows that the Court was "held as aforesaid, and before the Honorable *John J. Taylor*, acting judge of said Court." The record nowhere shows by what means he became judge, nor for what reason. Upon overruling a motion for a new trial, he gave thirty days to perfect bills of exceptions. They were filed within the time, with his signature placed thereto, as judge, to-wit, about twenty-five days after said trial. No objection appears in the record to his presiding at said trial; nor does any express agreement to that effect appear.

A motion is made here, by the appellee, to strike out said bills of exceptions, so signed, on the ground that the said *Taylor* had no authority to sign the same. This objection seems to be based upon the supposition that the authority of the said *Taylor* ceased with the term. In support of this position, is an affidavit filed here, that he presided at said trial only, and that, by permission, for the convenience of Judge *Ty'er*. The record itself does not disclose when his right to act began, nor when it ended; nor, indeed, is it affirmatively shown that he had any such right. In the absence of evidence, or judicial knowledge, of the right of said *Taylor* to sign said bills, we can not presume such right to exist. So far as the motion is concerned, it ought, therefore, to be sustained. But the appellant insists, that if the said *Taylor* could not make a record, by signing a bill of exceptions after the term, that he could not hold the Court, and, therefore, the whole proceeding is void, and should be reversed. Perhaps, as an incident to the right and power of a judge to hear a case, he might, if his term of office expired at the time of the rendition of judgment, sign bills of exception in said case, which would require further time for correct preparation, when prepared.

But we are of opinion that it should appear from the record, or be within the judicial knowledge of an appellate Court, that the inferior tribunal, before which a case was tried, had authority to act in the premises, either legally, or in fact; and as it does not so appear, in this case, that, therefore, the whole proceeding is without law, and can not be maintained; that is, so far as it appears to have been conducted by *Taylor*.

Per Curiam.—The judgment is reversed, with costs. Cause remanded, &c.

J. F. McDonald and *A. L. Roache*, for the appellant.

W. H. Malory, for the appellee.

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GODMAN v. SMITH.

17 152;
146 504.

GODMAN
v.
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Where a debtor has claimed the benefit of the exemption law, and three hundred dollars' worth of property has been set off to him, it may afterward be sold by him, discharged from the lien of the execution.

Where a debtor has not three hundred dollars' worth of property, upon which an execution might attach, it being all personal property, it does not become subject to the lien of the execution.

Friday,
November 29.

APPEAL from the *Tippecanoe* Common Pleas.

PERKINS, J.—On *July* 25, 1860, an execution against the property of *Michael Alderson*, in favor of one, *Wade*, came into the hands of *Godman*, sheriff of *Tippecanoe* county. *Alderson*, at that time, had certain articles of personal property, one of which was a horse, but all of which were of less value than three hundred dollars. While the execution was in *Godman's* hands, *Alderson* sold the horse mentioned, to *Smith*. *Godman* then levied upon it, as being subject to execution, for *Alderson's* debts. *Smith* brought this action against the sheriff, to recover the horse, claiming that he was not subject to execution. The pleading in the cause below, was a complaint, in the usual form, with the proper oath, to recover the article of personal property. Answer, by the sheriff, that he took the property, as that of *Alderson*, by virtue of an execution, averring the property to have been subject to the lien of it. Reply, that *Alderson* had not, including the horse, at the time of the issuing of the execution, nor since, property of the value of three hundred dollars, and that he claimed it all as exempt from execution. A verified schedule of his property, with his claim of it, an exempt, &c., and a demand for its appraisement, &c., accompanied the reply.

On a demurrer to the reply, the Court gave judgment for the plaintiff.

The question in the case, is, whether the three hundred dollars' worth of property exempt from execution, in the hands of the debtor, is also exempt in the hands of a purchaser from the debtor. The Legislature has not attempted to restrict the right of the debtor himself, to sell his exempt

personal property. See *Slaughter v. Detiney*, 10 Ind. 103. The Legislature has acted upon the assumption, that such right ought to exist; but, in this view, it would very much impair the value of the exemption provision, to hold that it was operative only while the specific articles of property remained in the possession of the debtor. It would destroy their merchantable value, to him; while their usefulness to his family might depend almost entirely upon that quality; and we are not able to perceive that serious inconvenience would result from continuing the exemption in the hands of a purchaser.

Let us look at it a moment, practically. *Prima facie*, the execution attaches to all the property owned by the debtor, at the date of its issue; but, by our statute, before the officer can levy, or at least, before he can sell, he must call personally upon the execution defendant, if he can be found in the county, and give him an opportunity to pay off the execution without a sale; or, if he can not do that, give him an opportunity to designate what property of his, that is subject to the execution, shall be sold to make the money.

Now, suppose he has plenty of property in his possession, over and above the three hundred dollars exempt, and over and above any that may have been sold; in this case, the officer could have no difficulty. He should take of such property, at all events, in preference to pursuing any that had been sold. Good faith to the purchaser would require this. Suppose, again, that the officer finds just three hundred dollars' worth in possession, independent of that which has been sold, and that no part of it was received in exchange for that sold; here, perhaps, it would be the duty of the defendant to designate a portion of that in possession, equal to the value of that sold, to be levied on by the officer; but if he did not, that sold would have to be included in the inventory of the debtor's property, in determining whether there was any subject to execution, and if no other alternative was presented, might be taken by the officer.

Suppose again, the officer finds that the defendant has just three hundred dollars' worth, including that sold; here, certainly, it should all be exempt. Or, suppose he finds just

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three hundred dollars' worth without that sold, but finds that a portion of it was derived from that sold, being of equal value with it; here, it would seem that that sold should be exempt.

There seems to be no difficulty in carrying out the exemption, and it works no wrong, but renders the exemption more valuable to the debtor. We are disposed to affirm the judgment.

We may remark, that it might have been wiser had the Legislature made the power of the husband to sell, dependent upon the consent of the wife, as a preventive to spendthrift waste.

On the whole, in this case, we decide this, and nothing more: that after the three hundred dollars' worth has been actually set off, it may be sold, discharged of the lien of the execution; and where a debtor has not three hundred dollars' worth of property, upon which the execution might attach, it being all personal property, it does not become subject to the lien of the execution.

Per Curiam.—The judgment is affirmed, with costs.

W. C. Wilson and *D. Mace*, for the appellant.

Vinton and *Miller*, for the appellee.

PHILLIPS and Another v. STEWART.

Section 15 of the act fixing the times of holding the Courts of Common Pleas, (Acts 1859, p. 84.) authorized a Court to be held in *Tippacanoe* county, in *December*, 1860, the law having gone into force in *October* of that year; and did not require that the Courts should begin, under that law, in the order of the months named, viz., *March*, *June* and *December*.

Friday,
November 29.

APPEAL from the *Tippacanoe* Common Pleas.

WORDEN, J.—Action by *Stewart* against the appellants, to foreclose a mortgage. Judgment for the plaintiff, for \$2,317.64.

Two questions are raised: 1. Was the term of Court at which judgment was rendered authorized by law? 2. Had the Court jurisdiction of the amount?

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v.
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The Court was held on *Monday, December 3, 1860*, in pursuance of § 15 of the act fixing the time of holding the Courts of Common Pleas, &c. Acts 1859, p. 84.

As this act did not take effect until *October, 1860*, it is claimed that no Court could be held in *December* of that year, inasmuch as the statute names the times in the order of "*March*," "*June*" and "*December*." We are not inclined to adopt the construction contended for. It seems to us that the law authorized a term to be held in *December* following the time when the act took effect, although that term was the last named in the section fixing the terms of the Court. We see no sufficient reason for supposing that the Legislature intended a hiatus in the terms, from the time that act took effect until the next *March*. The term of the Court was, as we think, authorized by the statute.

That the Court had jurisdiction of the amount, has been settled in several cases. *Vide Lintz v. Hoyt et al.*, at the present term.

Per Curiam.—The judgment is affirmed, with 3 per cent. damages and costs.

R. C. Gregory, for the appellant.

D. Mace, for the appellee.

CLENDENING and Another v. CLYMER, Guardian of EDWARDS.

A., by her will, directed that her property should be sold by her executors, and the proceeds, after paying certain other legacies, distributed as follows, viz: To her daughters, *B.*, *C.*, and *D.*, the sum of three hundred dollars each; the residue of her estate to be divided equally among her said daughters, share and share alike. *C.* died before the testatrix, leaving one son, her only heir, surviving. At the time of the execution of the will, the testatrix held lands, but disposed of the same before her death. The executor having paid the debts, and a portion of the legacies, brought into Court a balance of \$852 for distribution; and, thereupon,

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the guardian of the minor son of *C.* filed a petition against *B.*, alleging, that in the lifetime of the testatrix, she gave to *B.* and *D.*, in lands and money, their full share of the estate, with an agreement that such advances should be in full discharge of the bequests to them, and asking that *B.* and *D.* be excluded from the distribution. It appeared in evidence, that the testatrix had advanced to *B.* and *D.*, the sum of one hundred dollars each, and also certain lands, valued at four hundred dollars; and there was evidence tending to show, that the lands and money were given, and received by them, in full of their legacies, and of their shares in the estate.

Held, that under § 13, 2 R. S., p. 313, the legacy to *C.* did not lapse by her death, in the lifetime of the testatrix, but vested in her son.

Held, also, that the money and land received by *B.* and *D.*, must be regarded as an ademption of their respective legacies of three hundred dollars.

Held, also, that where a parent, or other person *in loco parentis*, bequeaths a legacy to a child, or a grandchild, and afterward, in his lifetime, gives a portion to, or makes a provision for, the same child or grandchild, without expressing it to be in lieu of the legacy, if the portion so received, or the provision made, be equal to, or exceed the amount of the legacy; if it be certain, and not merely contingent; if no other distinct object be pointed out; and if it be *ejusdem generis*; then it will be deemed an ademption of the legacy.

Held, also, that the doctrine of constructive ademption does not apply to a devise of a mere residue; and parol evidence not being admissible to show that advancements were intended to operate as an ademption of a residuary legacy, the residuary interest given by the will to *B.* and *D.* can not be regarded as adeemed, by the land and money advanced to them.

Friday,
November 29.

APPEAL from the *Miami* Common Pleas.

WORDEN, J.—*Phoebe Clymer*, in her lifetime, executed a will, by which she directed that her property, both real and personal, be sold by her executor, and the proceeds distributed among her children, as therein specified. After making several bequests to other children, the will contains the following items, viz:

"*Seventh.* I will and bequeath to my dearly beloved daughter, *Cynthia Clendenning*, and to her heirs, three hundred dollars.

"*Eighth.* I will and bequeath to my dearly beloved daughter, *Phoebe Edwards*, one hundred and forty dollars, which, with what she has received, will make her portion three hundred dollars.

"*Ninth.* I will and bequeath to my dearly beloved

daughter, *Olinda Bills*, and her heirs, three hundred dollars. Nov. Term,
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“*Lastly*. I will and direct that the residue of my estate be divided equally among my three daughters, *Cynthia Clendenning*, *Olinda Bills* and *Phoebe Edwards*, share and share alike.” CLDENNING
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CLYMER.

At the time of the execution of the will, the testatrix had lands, but disposed of the same before her death.

The executor, having paid the debts, and some of the legacies, including the \$140 to *Phoebe Edwards*, found left in his hands for distribution, the sum of \$852.84; which sum he brought into the proper Court, to be distributed as it might order, there being conflicting claims set up thereto.

Thereupon, *John Clymer*, as guardian of *Christian Edwards*, (who was the son and only issue of *Phoebe Edwards*), filed his petition against *Cynthia Clendenning*, and her husband, *Robert*, alleging that in the lifetime of the testatrix, and a few days before her death, she gave to said *Cynthia*, and also to said *Olinda Bills*, in lands and money, their full share of her estate, with an agreement that such advances should be in full discharge of the bequests. The petition prayed that *Cynthia* and *Olinda* be excluded from the distribution.

Clendenning and wife, who were alone made defendants to the petition, demurred thereto, but the demurrer was overruled and exception taken. They then answered; and such proceedings were had, upon trial of the issues formed, as that it was ordered by the Court, that the clerk pay \$50 to one, and \$100 to another legatee, whose legacies had not been paid, and about which sums there is no controversy; and that the residue be paid to said *Christian Edwards*.

Clendenning and wife appeal. We shall pass over the questions as to the validity of the petition, as the substantial merits of the case are otherwise presented by the record.

The testatrix survived *Phoebe Edwards*; the legacy to her, however, did not lapse, but the right thereto vested in her descendant *Christian*. 2 R. S. 1852, § 13, p. 313. By the order of the Court, he gets not only the \$140 bequeathed to

Nov. Term, his mother, but the whole residue of the estate, which was
1861. directed by the will to be distributed equally between his

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mother and *Cynthia* and *O'inda*. This order of the Court was made on the following facts, appearing by the evidence: The testatrix, in her lifetime, advanced to *Cynthia* and *Olinda*, each, the sum of \$100. The inference from the evidence is, that those advancements were made after the execution of the will. She, also, a few days before her death, made arrangements by which *Cynthia* and *Olinda*, each, or perhaps their husbands in their right, received from her, lands estimated at \$400. There is parol evidence having a tendency to show that the land and money thus received by them, were received in full of their legacies, and of their share in the estate, and were so intended by the testatrix.

We are inclined to the opinion that the money and land, thus received by *Cynthia* and *Olinda*, may be regarded as an *ademption* of the respective legacies of \$300, thus bequeathed to them; though this view is not, perhaps, entirely free from difficulty. Where a parent, or other person *in loco parentis*, bequeaths a legacy to a child or grandchild, and afterward, in his lifetime, gives a portion, or makes a provision for the same child or grandchild, without expressing it to be in lieu of the legacy, if the portion so received, or the provision made, be equal to, or exceed the amount of the legacy; if it be certain and not merely contingent; if no other distinct object be pointed out; and if it be *ejusdem generis*; then it will be deemed an *ademption* of the legacy. The ground of this doctrine seems to be, that every such legacy is to be presumed as intended by the testator to be a portion for the child or grandchild, whether so called or not; and that, if he afterward advances the same sum upon the child's marriage, or any other occasion, he does it to accomplish his original object, as a portion; and that under such circumstances, it ought to be deemed an intended satisfaction or *ademption* of the legacy, rather than an intended double portion. 2 Story Eq., §§ 1111-1112. *Vide*, also, *Langdon v. Astor's Ex'rs*, 16 N. Y. 9. The difficulty in the application of this doctrine to the present case, is, that the

money bequeathed, and the land advanced, are not, in the language of the books, *ejusdem generis*. But this, in view of the whole case, we regard as unimportant. The money bequeathed was to be raised by a sale of the lands of the testatrix. The advancement of the land itself, or a portion of it, may be regarded as substantially accomplishing the same object. Or the land, at the estimated value, may be regarded as having been received as so much money.

What we have said has reference to the general legacies of \$300 to *Cynthia* and *Olinda*. We are of opinion that these legacies were correctly found to have been adeemed. But in respect to the residuary legacies, a very different question is presented. The doctrine of presumed or constructive ademption is not applicable to them. "It does not apply to the case of a devisee of a mere residue; for it has been said that a residue is always changing. It may amount to something, or be nothing; and therefore no fair presumption can arise of its being an intended satisfaction, or ademption." 2 Story's Equity, § 1115.

There being no presumption that a subsequent advancement was intended as an ademption of the residuary legacies, the question arises whether parol evidence is admissible to show that such was the intent of the testatrix, and thereby defeat the terms of the will. This leads us to inquire into the principle upon which parol evidence is admissible, in respect to general legacies. If a testator bequeath his son a thousand dollars, and afterward, in his lifetime, advance him the same sum, the law presumes that he intended the advancement as an ademption of the legacy; but as this is only a presumption, parol evidence is admissible to repel it, and show that the sum advanced was intended to be cumulative; and when such evidence is given, it may be met, and the presumption strengthened, by the same kind of evidence. No case has been cited, and we know of none, where parol evidence has been received to show that advancements were intended to operate as an ademption of a residuary legacy. On the contrary, the case of *Freemantle v. Bankes*, 5 Vesey, 79, is directly against it. There, the Chancellor says: "To admit it in this case, would be to admit parol evidence to

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Nov. Term, 1861. make a part of the will. In the cases referred to, of the advancement of a child in the life of the testator, it was to

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rebut an equity." The cases referred to were cases where parol evidence was held admissible to rebut the presumption that an advancement was an ademption of a general legacy; and if admissible for that purpose, it was said to be admissible on the other side. The principle is pretty clearly elucidated in the case of *Timberlake et ux. v. Parish's Ex'r*, 5 Dana, 346. The Court say: "If a parent bequeaths property to a child, the bequest would be construed as having been intended as a portion; so, too, if a stranger, showing by his will that he assumes to stand *in loco parentis* toward his legatee, makes a bequest to another stranger. And therefore, in either case, if the testator afterward makes a provision by way of advancement to his legatee, it will, according to its character and extent, be presumed to be an ademption, altogether, or *pro tanto*, of the bequest. In such case, the legal effect of the bequest, arising from the construction of the will itself, would be defeated by a presumption resulting, *prima facie*, from the fact that the last act was intended as an execution of the purpose, in whole or in part, contemplated by the first. . . And, of course, such a presumptive ademption or satisfaction, arising from such coincidences, and not being conclusive and incontrovertible, may be either fortified or repelled by any facts which may tend to the same or a different inference. And the admission of parol testimony for such purpose, would not be subversive of any rule of evidence, or inconsistent with the policy of the statute of frauds, or of wills; because it would not be used for the purpose of contradicting or explaining evidence of a higher grade, or of defeating the constructive effect of any writing. But where, as in this case, a will or other document of title, is ascertained to import a certain legal effect, if such effect could be controlled or defeated by extrinsic parol evidence, inconsistent with the legal construction of the written memorial, the established gradation of evidence would be abolished, or disregarded, and the statute of frauds, and of wills, and of conveyances, would be perfectly nugatory. . . . The question as to the effect and purpose of the legacy in this

case, is one altogether of legal construction. There is no *presumption* arising from any fact appearing in the will, or out of it, which parol or extrinsic evidence would be competent to *fortify* or *defeat*. The object of the extraneous evidence introduced, but objected to, was not to fortify or repel a presumption previously arising from the will, or otherwise; but it was to defeat the legacy, by proving, not a latent ambiguity, but a fact inconsistent with the constructive import and effect of the will itself. If such an end can be thus attained, the effect of the most solemn wills will always depend on the veracity of witnesses, and not on the language and provisions of the wills themselves."

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The advancement made to *Cynthia Clendenning* not being an ademption of the amount, whatever it might be, that she was entitled, by the terms of the will, to receive as residuary legatee; and extrinsic evidence being wholly inadmissible to show that the testatrix intended by such advancement to adeem the residuary legacy, and thereby defeat the provisions of the will in that respect, it follows that she was entitled to receive one third of the residue, which was ordered to be paid to said *Christian*. As *Olinda Bill's* is not before us, we decide nothing in respect to her rights in the premises.

Per Curiam.—The judgment is reversed, with costs. Cause remanded, &c.

N. O. Ross and *R. P. Effinger*, for the appellants.

S. W. Robinson, for the appellee.

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If, after the indorsement of a promissory note, the name of another maker is added to the note, without the knowledge or consent of the indorser, the latter is discharged from his liability on the note.

An assignment of error in these words, viz., "The judgment should have been for the defendant instead of the plaintiff, and should have sustained

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the motion for a new trial," though not artistically drawn, is sufficient to bring in review the decision of the Court on the motion for a new trial.

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APPEAL from the *Putnam* Common Pleas.
WORDEN, J.—Action by *Coats*, as indorsee, against *Henry*, upon his indorsement of the following promissory note:

Saturday,
November 30.

"\$375.33

GREENCASTLE, May 25, 1858.

"Twelve months after date, for value received, we promise to pay to the order of *Hallowell & Humphrey*, three hundred and seventy-five dollars and thirty-three cents, without any relief whatever from valuation or appraisement laws, with interest from date.

(Signed,) "JOHN BRADSHAW,
"THOMAS N. WILLIAMS."

The note is indorsed:

"For value received, we assign the within note to *William H. Coats*."

"HALLOWELL & HUMPHREY."

Below these signatures, is that of

"SOLOMON HENRY."

It is averred that after the making of the note, and before the indorsement thereof by the payees, the name of the defendant was placed upon it, the better to enable the payees to negotiate it. Judgment for the plaintiff.

The appellee has assigned some cross errors, but having filed no brief in the cause, we need not notice the errors thus assigned.

The appellant has assigned several errors, but it will be necessary to notice only one point arising upon the evidence in the case, as that goes to the merits of the cause, and defeats the plaintiff's right to recover.

It appeared on the trial of the cause, by the testimony of *John W. Humphrey*, one of the payees of the note, who was in no manner contradicted in his statement of the facts, that the note was made at the date of it, by *Bradshaw alone*. That about a month after the note was thus made and delivered, it was changed from "I promise," as it read before, to "We promise" to pay, &c., and *Thomas N. Williams* put his name to the note, below that of *Bradshaw*, with his

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COATS.

consent. That between the time of the making of the note by *Bradshaw*, and the alteration thus made, and while it was the note of *Bradshaw* only, the defendant's name was placed upon it. The change was made without the knowledge or consent of the defendant. Before the note was changed, the payees wanted to sell it to one *Henry Miller*, who wanted another name on the note. The payees told the defendant they wanted his name on the note, in order to sell it to *Miller* to raise the money. He put his name upon it. This was some days before the note was changed, as above mentioned. *Miller* refused to purchase the note. Afterward, the change was made, and the note transferred to the plaintiff, without the knowledge or consent of the defendant.

A paragraph of the answer, duly verified, set up substantially these facts, which were traversed, and a reply in avoidance filed, alleging that after the alteration of the note, and before the sale thereof to the plaintiff, the defendant recognized and approved of the alteration, and that in faith thereof, the plaintiff purchased the note. This reply, however, was wholly without proof.

Whatever may have been the liability assumed by the defendant, in placing his name upon the back of the note, we are of opinion that he was discharged therefrom by the alteration thus made by the payees, without his knowledge or consent. The note upon which he placed his name was an essentially different instrument from the one into which it was converted by the alteration thus made. As indorsed, it was the individual note of *Bradshaw*; as altered, it was the joint note of *Bradshaw* and *Williams*. It is idle to say that the defendant was not injured by the addition of another name as maker of the note. The character and identity of the instrument indorsed by the defendant were changed by the alteration. The alteration left in existence no instrument indorsed by the defendant; that instrument was destroyed.

"It is abundantly settled that a material alteration in a note or bill, avoids it as to previous parties, not consenting thereto." *Holland v. Hatch*, 11 Ind. 497, and cases there cited. In a note to *Master v. Miller*, cited in the case just referred to, it is said that "Alterations in the date, sum, or

Nov. Term, 1861. *time for payment, or the insertion of words authorizing transfer, or expressing the value to be received on some particular account, adding the name of a maker or drawer, or an unwarranted place for payment, are material alterations within the above rule."*

HENRY
v.
GOSSETT.

A new trial, which was properly moved for, should have been granted.

Since the foregoing opinion was prepared, a brief for the appellee has been received. The appellee insists that the reasons for a new trial are not sufficiently specific to raise any question; and *Barnard v. Graham*, 14 Ind. 322, and *Medler v. Hiatt*, *id.* 405, are referred to as sustaining this position. The reasons are as follows:

"1. That the finding of the Court is not sustained by the evidence.

"2. That the finding of the Court is contrary to law.

"3. Errors of law occurring at the trial, and excepted to at the time."

The cases cited establish that the third reason is insufficient to raise any question; but they do not decide, nor is it intimated in them, that the first and second are not good.

Again, it is assumed in the brief that no error is assigned upon the ruling of the Court in overruling the motion for a new trial.

The last assignment of error is in these words: "That said judgment should have been for the defendant, instead of the plaintiff; and should have sustained the motion for a new trial." This assignment, though not very artistically drawn, seems to be sufficient to bring in review the decision of the Court on the motion. The brief does not point out any error in the rulings on which cross errors are assigned.

Per Curiam.—The judgment is reversed, with costs. Cause remanded, &c.

John Hanna and Williamson & Daggy, for the appellant
H. Seorist, S. Turman and J. Cowgill, for the appellee.

SHELDON and Others v. ARNOLD.

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1861.SHELDON
v.
ARNOLD.

On *December* 28, 1857, *A.* recovered two judgments against *B.*, before a justice of the peace, for the sum of \$200 each, and immediately thereafter filed in the clerk's office of the proper county, certified transcripts of the said judgments. On *January* 5, 1858, *C.* purchased of *B.* a tract of land in said county, and paid him the purchase money in full. Afterward, on *January* 29, 1859, the transcripts, together with the order book in which they were recorded, were destroyed by fire, and on *March* 26, 1859, the justice again made out transcripts, which were filed, and executions issued thereon were levied on the real estate purchased by *C.* Suit to enjoin the sale.

Held, that the judgments, upon the filing of the first transcripts, became liens on the land, but those transcripts, and the records thereof, having been destroyed, no executions could issue thereon until they were reinstated, in the mode pointed out by 2 R. S., § 20, p. 510.

Held, also, that the judgments, as evidenced by the second transcripts, were not liens on the land; and *quære*, whether the filing of the new transcripts was not a waiver of the liens of the old.

APPEAL from the *Noble* Common Pleas.Saturday,
November 30.

DAVISON, J.—This was an action by the appellee, who was the plaintiff, to enjoin the sale, on execution, of certain real estate, described as lots 17 and 18, in *Legonier*, *Noble* county. The appellants were the defendants below. Defendants demurred to the complaint; but their demurrer was overruled, and thereupon they filed their answer, to which the plaintiff demurred. This demurrer was sustained, and final judgment rendered for the plaintiff, enjoining the sale, &c.

The facts of this case, as they are set forth in the pleadings, are substantially these: *Sheldon*, *Hoyt* and *Van Graasbeck*, on *December* 28, 1857, recovered two judgments against *Johnson Curl* and *James Smalley*, each for \$200, before a justice of the peace of *Nob'e* county; and on the 29th of that month, filed transcripts thereof in the clerk's office of the *Noble* Common Pleas, which were duly certified by the justice, and by the clerk of said Court duly entered upon the order book. On *January* 5, 1858, the plaintiff, for the consideration of \$300, then paid to *Johnson Curl*, purchased of him the real estate in question, and received from him a deed in fee simple, pursuant to the purchase; and the

Nov. Term,
1861.

SHELDON
V.
ARNOLD.

plaintiff avers that when he received the deed, he had no knowledge whatever of any lien upon said real estate; that the same was purchased in good faith, without intent to defraud any one. After this, on *January* 29, 1859, the transcripts, so filed and recorded, together with the order book in which they were recorded, were destroyed by fire; and afterward, on *July* 25, 1858, the justice issued an execution on each of said judgments, which were duly returned, "*nulla bona*." On *March* 26, 1859, the justice, a second time, made out and certified transcripts of the same judgments, and delivered them to the said *Sheldon*, *Hoyt* and *Van Graasbeck*, who filed them in the clerk's office of said Court, and the same were by the clerk duly recorded, &c. The proper affidavit having been made, an execution was duly issued by the clerk, upon each judgment, so on file and recorded as afore-said; which executions were placed in the hands of *David S. Semmons*, the then sheriff of *Nob'e* county, and by virtue of which the above described real estate has been levied on and advertised for sale, &c. Now, the inquiry arises whether, upon these facts, the ruling of the Common Pleas can be sustained?

It must be conceded, that the judgments upon the filing and recording of the first transcripts became liens upon the lands described in the complaint; but these transcripts and the records thereof were destroyed, and, of course, no executions could issue upon them until they were reinstated in some mode known to the law. Have they been so reinstated? It is enacted, that any circuit or inferior court of record, held in any county, the records whereof have been destroyed, in whole or in part, may cause to be reinstated any judgment or decree, before that time made or rendered in said Court. 2 R. S., § 20, p. 510. The terms "made or rendered in said Court," as used in the statute, if literally construed, would not embrace the judgment of a justice, filed and recorded in the Circuit or Common Pleas Court; but such judgment, when so filed and recorded, is, evidently, within the equity of the statute. *Smith's Comm.* 813, *et seq.* This construction being correct, and we think it is, the judgments in this case, their records having been destroyed, can

not be held liens until they are reinstated in the mode pointed out by the statute. And it may be assumed with a degree of plausibility, that the filing of the second transcripts, without such reinstatement, was, of itself, a waiver of the lien created by the first. At all events, the judgments as set forth in the last transcripts, are not liens upon the land, because it had been sold and conveyed to the plaintiff at the time they were filed and recorded. And the result is, the levy of the executions was inoperative and void.

Per Curiam.—The judgment is affirmed, with costs.

R. Parrett, for the appellants.

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1861.

RIGSBEE
v.
BOWLER.

RIGSBEE v. BOWLER.

The Common Pleas act of 1859, (Acts 1859, p. 89,) requires writs in that Court to be made returnable on the first day of the term, but the naming of a wrong day, in the right term, in the writ, is a mere clerical error, which would work no prejudice, the defendant being supposed to know the law; but a writ made returnable to a wrong term, or made to run past a term, would be void.

17	167
168	667
17	167
168	421
17	167
168	637

To a suit by an assignee, upon a promissory note not payable in bank, the defendant answered, that before notice of the assignment of the note, the payee had agreed with him, in consideration that he would pay him another debt of three hundred dollars before the same became due, that he would extend the time of payment of the note sued on.

Held, that the answer presented a good defense.

A subsequent verbal agreement, changing a previous written agreement, may be valid, and may be proved by parol, in a case where the original contract might have been made by parol.

APPEAL from the *Shelby* Common Pleas.

Saturday,
November 30.

PERKINS, J.—*Bowler* sued *Rigsbee* upon a promissory note made by the latter to one *Carney*, by whom it was indorsed to one *Corey*, who indorsed it to the plaintiff, *Bowler*.

The writ, in the cause, was made returnable on the second

Nov. Term, 1861. day of the next term succeeding its issue, and was served ten days before the first day of the term.

Rossman

v.

Bowler.

Had the writ been returnable in the Circuit Court, it would have been regular. Perk. Prac. 147. But the Common Pleas act of 1859, requires writs in that Court to be returnable on the first day of a term. Acts 1859, p. 89.

The naming of a wrong day, in the right term, in the writ, was, however, a mere clerical error, which worked no prejudice. The defendant knew the law, and knew that by it the writ was returnable on the first day of the term. *White Water Valley, &c. Co. v. Henderson*, 3 Ind. 3; *Davidson v. Alvord*, id. 1; *Ziegenhager v. Doe*, 1 Ind. 296. Had the writ been returnable to a wrong term, or run past a term, it would have been void. *Carey v. Butler*, 11 Ind. 391. For a modification of this rule in attachment cases, see *Will v. Whitney*, 15 Ind. 194.

The note on which this suit was brought, was not payable at bank; was given in 1855, and was payable *December 25, 1859*. The defendant answered to the suit, that in 1856, after the giving of the note sued on, and before he had any notice of its assignment, he became indebted to the payee of it in the further sum of three hundred dollars, due at a future day, and the said payee agreed that if the defendant would then pay to him the said three hundred dollars, before it fell due, he would extend the time of payment of the note now sued on, till *December 25, 1860*. And the defendant avers that, in pursuance of said agreement, and as the consideration of such extension of time, he did then and there, and before the same was due, pay to said *Carney*, the payee of the note, said three hundred dollars, &c.

The Court sustained a demurrer to this answer. The Court erred.

It was held by the Supreme Court of *Ohio*, in *Peck v. Beckwith*, 10 Ohio St. Rep. 497, that when the payee and holder of a promissory note, before its maturity, agrees with the maker to give further specified time for its payment, in consideration of a sum of money then and there paid him by the maker, such agreement is a valid contract, and may be set up as a temporary bar in an action brought, before

the expiration of such further time, against the maker, by an assignee who acquired the note after maturity, or with notice. In the case at bar, the new contract is shown to have been made before breach. See *Billingsley v. Stratton*, 11 Ind. 396, and cases cited. Payment of a debt before it is due, is a good consideration for a promise. See *Fitzgerald v. Smith*, 1 Ind. 310, 314. A subsequent verbal agreement, changing a previous written agreement, may be valid, and may be proved by parol, (Ind. Dig., p. 291,) in a case where the original contract might have been made by parol. Fry on Specific Performances, side p. 303. It is held in *Lanell v. Rader*, 24 Penn. St. Rep. 283, that where a sealed agreement is so changed by a subsequent written one, that the former could not be executed in connection with the latter, as made, the whole becomes parol. In *McComb v. Kittridge*, 14 Ohio Rep. 384, it is held that a written agreement, past due, may be altered by a parol agreement.

Per Curiam.—The judgment is reversed, with costs. Cause remanded, &c.

M. M. Ray and *B. F. Davis*, for the appellant.

William Henderson, for the appellee.

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1861.

FLOURNOY
v.
THE CITY OF
JEFFERSON-
VILLE.

FLOURNOY and Another v. THE CITY OF JEFFERSONVILLE.

In the year 1854, the *City of Jeffersonville*, acting under the general law of 1852 for the incorporation of cities, contracted with one *C*, to grade and gravel a street in said city. The work was performed by the contractor, and in the year 1860, a suit was brought in the name of the city, to recover an assessment against one of the property holders for said work.

Held, that the city was a mere nominal party, the contractor being the party beneficially interested, and hence a set-off against the city could not be allowed.

Held, also, that the suit could not be maintained, as the remedy for the collection of street assessments had been changed by the act of 1857, which was re-enacted in 1859, and is still the law.

Held, also, that the bringing of this action, though erroneous in form, will,

17	109
131	550

17	109
136	511

17	109
147	495

17	109
163	606

17	189
167	324

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FLOURNOY
v.
THE CITY OF
JEFFERSON-
VILLE.

under 2 R. S., § 218, p. 77, save the claim of the plaintiff from the bar of the statute of limitations.

The remedy now given for the collection of assessments for the grading and graveling of streets, viz., by precept issued by the mayor and clerk, under the direction of the council, is constitutional.

The issuing of the precept is a ministerial act, and may be performed by any person upon whom the law may cast the duty; the judicial determination of the case is had upon appeal.

Judicial acts, within the meaning of the Constitution, are such as are performed in the exercise of judicial power, and must, hence, be performed by a court, touching the rights of parties, or property, brought before it by voluntary appearance, or, by the prior action of ministerial officers.

A ministerial act is one which a person performs in a given state of facts, in a prescribed manner, in obedience to the mandate of legal authority, without regard to, or the exercise of, his own judgment upon the propriety of of the act being done.

Saturday,
November 30.

APPEAL from the *Clark* Common Pleas.

PERKINS, J.—In 1854, the *City of Jeffersonville, Indiana*, acting under the general law of 1852 for the incorporation of cities, made a contract with *Calvin Cook*, for the grading and graveling of a street in said city. *Cook* performed the work stipulated in his contract, and an assessment for payment was made, but one of the property holders, before whose property grading was done, refused payment.

In 1860, the City instituted a suit in the Court of Common Pleas of *Clark* county, by filing a complaint against the original owner, and subsequent purchasers, to enforce payment of said assessment for the benefit of the contractor.

The amount sued for, was over three hundred dollars.

There was a demurrer to the complaint overruled.

The defendant answered to the whole of action cause, a set-off of about sixty dollars, as against the city.

This answer was bad, for two reasons: 1. The city was a mere nominal party; *Cook* was the beneficiary. 2. The answer purported to go to the whole cause of action, while it was a bar to but part.

Most of the other questions raised and discussed in the cause, are settled in *The City of Indianapolis v. Imberry*, *post* p. 175, and need not be noticed here.

There is another reason why we should not consider them. This suit can not be sustained. It was a mode of proceeding

prescribed by the charter of 1852, but that charter was repealed in 1857, except as to existing rights, and an entirely different mode of proceeding prescribed. The right, not the remedy, except where suits were pending, was saved in the repeal. The new remedy was re-enacted in 1859, and is probably still the law. Acts 1861, p. 32. Perhaps the amendments in these acts do not reach this part of the remedy.

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1861.

FLOURENOY
v.
THE CITY OF
JEFFERSON-
VILLE.

The suit by the city to enforce the payment of a demand of a contractor, against a third person, the city not having first paid it, could not probably be maintained, simply by virtue of our code of pleading, which requires suits to be brought in the name of the party having the beneficial interest. No person had any contract with the property holders. The city enforced payment from them, not by virtue of a contract, but through statutory law; through the provision of the charter authorizing it, and only by that means, as the city was not liable, in any event, to the contractor for his pay, as against the property holders, and had no common law ground for a suit against them. The provision furnishing this special remedy having been repealed, and another remedy substituted by a new enactment, the former remedy fell, and the latter became the one to be adopted.

This resulted from the two established principles, that the Legislature may change, so it does not substantially impair legal remedies (*Maynes v. Moore*, 16 Ind. 116); and that where the Legislature creates by statute a right and an accompanying remedy, that remedy must be pursued, (see the cases cited in *Prozman v. The Indianapolis, &c.*, 9 Ind. 467,) and the common law remedy can not be. 1 Hilliard on Torts, first ed., p. 111.

It may be observed with propriety, here, that the suit prosecuted in this case, though erroneous in form, so that it cannot be maintained, will, nevertheless, save the claim of the plaintiff from the bar of the statute of limitations. Our statute enacts, (2 R. S., § 218, p. 77,) that "If after the commencement of an action, the plaintiff fail therein, from any cause except negligence in the prosecution, or the action abate, or be defeated, by the death of a party, or judgment be arrested or reversed on appeal, a new action may be

Nov. Term, brought within five years after such determination, and be
1861. deemed a continuation of the first, for the purposes herein
contemplated."

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v.
THE CITY OF
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VILLE.

A mistake as to the form of remedy, is not "negligence in the prosecution" of the suit, within the intent of the above section, according to the case of *McKinney v. Springer*, 3 Ind. 59.

The question is raised in the case at bar, and also in two other cases, *The City of Indianapolis v. Imberry*, and *The City of Logansport v. Blackmore*, post, 175, whether the new remedy provided for the collection of dues for street improvements, viz., by precept from the council, mayor and clerk of the city, is constitutional; and we will dispose of the question for all the cases, in this one.

We have been unable to put our finger upon any provision of the Constitution of *Indiana*, with which the provision of the statute prescribing the remedy in question conflicts. We lay down and indicate the following propositions, though involving some repetitions:

1. The provision, in substance, prescribes a mode of getting a cause into court; and it is not unconstitutional because it authorizes another officer than the clerk of the court to issue the first process, by which judicial proceedings are initiated. The Constitution does not give to the clerk the exclusive right to discharge any particular duty; but declares that he shall perform such as may be prescribed by law. Art 6, § 6.

The issuing of the writ is a ministerial act, and may be performed by any person upon whom the law may cast the duty. It issues upon an affidavit, as matter of course; and is as much a ministerial act as is the issuing of an attachment, or writ of replevin, by the clerk of the court upon affidavit, or of a summons upon a complaint, in court vacation. It is quite analogous to the original writ, at common law, which issued in the king's name, under his great seal, directed to the sheriff of the county where the injury was alleged to have been committed, requiring him to command the defendant to satisfy the claim; and, on his failure to comply then to summon him to appear in some one of the Courts, the particular one being named, but not that from which the

writ issued, as it did not issue necessarily from a court, to account, &c. Steph. on Pl. 5. Here, the party, if he does not elect to satisfy the claim, may transfer his cause to a court by appeal, instead of by appearing to a summons.

The case is very like that of *Maynes v. Moore*, 16 Ind. 116, where the Auditor of State, as a ministerial officer, was authorized to issue the writ commanding satisfaction, but which, if the party did not see fit to obey, he could enjoin, and thus transfer his cause to a court by injunction, instead of by answering to a summons. A suit need not necessarily go into court by a writ from the clerk. *Gaston v. The Board of Commissioners, &c.*, 3 Ind. 497; *The Lake Erie, &c. Railroad, Co. v. Heath*, 9 id. 558.

2. The provision is not unconstitutional because it deprives a party of a right, without a judicial hearing and trial by jury. As in the *Maynes* case by injunction, expressly authorized by the statute as a part of the remedy, so here by appeal from the issue of the precept, the writ, the party can transfer his case to a judicial tribunal, and demand the right of trial by jury. The remedy is not an onerous, a burdensome one, even.

3. The provision is not unconstitutional because it imposes upon a ministerial officer the performance of a judicial act.

The issuing of the writ, as we have said, is a ministerial act, as much as the issuing of an attachment, or *capias* for the arrest of the body, upon an affidavit.

Judicial acts, within the meaning of the Constitution of *Indiana*, are such as are performed in the exercise of judicial power. But the judicial power of this State is vested in courts. A judicial act then, must be an act performed by a court, touching the rights of parties, or property, brought before it by voluntary appearance, or by the prior action of ministerial officers, in short, by ministerial acts. See *Waldo v. Wallace*, 12 Ind. 569, where the constitutional provisions are quoted. The acts done out of court, in bringing parties into court, are, as a general proposition, ministerial acts; those done by the court in session, in adjudicating between parties, or upon the rights of one in court *ex parte*, are judicial acts. 3 Blacks. Comm., p. 25.

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And the act is none the less ministerial, because the person performing it, may have to satisfy himself that the state of facts exists under which it is his right and duty to perform the act. In *Betts v. Dimon*, 3 Conn. 107, where it was held that the administration of the poor debtor's oath was a ministerial, not a judicial act, *Hosmer*, C. J., in delivering the opinion of the Court said: "Every selectman, before the appointment of an overseer, and every sheriff, previous to taking bail, makes inquiry to aid him in the legal performance of his duty."

So in *Crane v. Camp*, 12 Conn. 463, it was held that a justice of the peace acted ministerially in appointing freeholders to assess damages sustained by taking land for a public highway, though it was necessary for him to make inquiry as to the fitness of the persons appointed.

A ministerial act may, perhaps, be defined to be one which a person performs in a given state of facts, in a prescribed manner, in obedience to the mandate of legal authority, without regard to, or the exercise of, his own judgment upon the propriety of the act being done.

4. The provision is not unconstitutional because it authorizes a ministerial act by which possession of property is taken before the right to it has been judicially determined. This is done in cases of attachment and replevin, without objection; and is a matter in the discretion of the legislative power, in creating remedies. It must not deprive a party of his property without a judicial hearing; but the stage of proceedings at which that hearing shall take place; the manner, in short, in which the cause of a party shall be got before the judicial tribunal, so it is not an unreasonably inconvenient and embarrassed one, is with the legislative power. *The New Albany, &c. Railroad Co. v. Connelly*, 7 Ind. 32. We think the remedy in the amended charter is not an unconstitutional one.

Per Curiam.—The judgment is reversed, with costs. Cause remanded, &c.

John W. Ray, II. C. *Newcomb*, and *J. Tarkington* for the appellant.

J. F. Read, for the appellee.

THE CITY OF INDIANAPOLIS v. IMBERRY.

Nov. Term,
1861.

By the general law for the incorporation of cities, the council has jurisdiction over the streets and alleys, with power to provide for their improvement:

1. Upon the petition of the property holders, according to § 66, by a majority vote.
2. By a two-thirds vote of the council, without a petition.

The order of the common council for the improvement of a street, need not be expressed in an ordinance, but may be made by motion, or resolution.

It is not necessary, in order to render the contract valid, that the council should enter of record its determination, under § 68, whether the improvement contracted for, shall be paid for by the property holders, or out of the general fund of the city; but where the council determines to pay out of the general fund, such an order should be made of record.

The bids for the work must be reported to the council, and that body must award the contract upon one of them; which contract must be in writing, and be filed with the proper officer.

The estimates of the amount due the contractor, must be made by the civil engineer of the city, and reported to the council, and that body must order the payment of the estimate, which then becomes an assessment, before the contractor can proceed, by precept, against the property holders.

On an appeal from a precept, the property holder may have a trial upon the merits, except as to irregularities prior to the making of the contract, which are waived, unless taken advantage of by an injunction suit, before the work is performed.

A law, or amendment of a charter, relating to remedial proceedings, such as the practice on the trial, rules of evidence, &c., may have immediate, instead of prospective operation.

APPEAL from the *Marion* Common Pleas.Saturday,
November 30.

PERKINS, J.—A transcript from the records of the city council of *Indianapolis*, shows the following facts to have occurred in 1859: On *February 26*, the council ordered advertisements for bids, for specified street improvements. On *March 12*, the civil engineer of the city reported to the council, the following, among other bids, for such improvements, viz., "For grading and graveling *Pennsylvania* street, and side walks, between *Pogue's* run and *Madison* avenue with coarse pit gravel, per yard. *W. & R. Johnson*, grading, 15, graveling, 80; *John Kelleher*, grading, 13½, graveling, 6½. The contract was first awarded to *Kelleher*; but he proving irresponsible, the contract was subsequently given to the *Johnsons*. The *Johnsons* executed the required contract,

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v.
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17	175
120	561
17	175
138	466
17	175
154	479
155	244
17	175
157	606
17	175
168	606

Nov. Term, and gave an approved bond, &c. The contract specified the
1861. width of the street, side walks, &c., and the thickness of the
THE CITY OF coat of gravel. It stipulated that the work was to be per-
INDIANAPOLIS- formed to the satisfaction of the civil engineer of the city, by
vs. *October 1, 1859.* The contract was signed by *James Wood*,
IMBERRY. civil engineer, for the common council of the city of *Indian-*
apolis, and was subsequently approved by the council.

In *April*, 1860, the council, by resolution, directed the civil engineer to make for the contractors, *Johnson*, a final estimate of the work specified in the contract. In *May*, the Messrs. *Johnson* filed, in the proper office, an affidavit, stating that on *April 16*, *James Wood*, the civil engineer, allowed and made out to them a final estimate, for the work mentioned in the contract above referred to, and that the estimate showed the sum of twenty-nine dollars and twenty-five cents as due from *August Imberry*, for a certain number of feet owned by him on said *Pennsylvania* street, specifying the number and the parts of lots, &c., which they formed, all of which sum remained unpaid, and that the improvement had been completed according to contract, &c. Upon this affidavit, the council ordered (the affidavit being made a part of the order,) that there should be a precept issued for the collection of the sum of money named, which precept was issued by the proper officer; whereupon *Imberry* appealed to the Common Pleas. In that Court, a demurrer was sustained to the transcript, as a cause of action, and final judgment rendered for the defendant.

Was the ruling upon the demurrer correct?

As there are no averment of unrecorded acts of the council, this question must be answered by comparing the acts shown by the transcripts to have been performed, with the requirements in the charter, and the by-laws of the corporation, touching this subject.

By the charter, the council has jurisdiction over the streets and alleys of the city, with power to provide for their improvement and repair. It has power to order them graded and graveled, or paved. It may do this: 1. Upon the petition of freeholders, according to § 66 of the charter, by a majority vote. 2. By a two-thirds vote of the council,

without a petition, according to § 68 of the charter. It does not appear, nor is it necessary that it should, in this case, whether there was a petition or not. The manner in which the order or determination of the council that a given street or alley, or part thereof, shall be improved, is to be expressed, is not pointed out in the paramount law, but we think it need not be by ordinance. We think it may be expressed by motion or resolution. It is urged that the latter part of § 68, renders it necessary that the council, in all cases, shall enter of record their determination whether the improvement contracted for shall be paid for by the property holders, or out of the general fund of the city, in order to render the contract in the case valid. But we do not think so. The charter authorizes the city council to let out the improvement of streets by contract, containing certain conditions, (the fund out of which payment is to be made not being one of them,) and it then declares the legal rights of the contractor, under such a contract, and the manner in which he may enforce payment for work done; and it declares that no question of fact shall be raised in such proceedings, behind the contract itself. But if the city should determine to pay out of the general fund, it would be necessary that such determination should be entered of record.

The case of *Bonesteel v. The Mayor, &c.*, 22 N. Y. R. 162, is not in point. The contract, in that case, was not within the authority, and was not performed.

The bids for the work must, under the general law for the incorporation of cities, be reported to the council, and that body must award the contract upon one of them; which contract must be in writing, and must be filed with the proper officer. This is plainly inferable from §§ 66, 67 and 68 of the charter.

The work under the contract may be paid for as it progresses, and must be fully paid for when completed. The payments are to be made upon estimates of the amount of work done, the last of which, at the completion of the contract, is called the final estimate. The council directs the payment of the estimates when made, which direction is called an assessment of the estimate, or simply an assess-

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Nov. Term, 1861. ment. An estimate directed by the council to be paid, becomes an assessment. The estimate is to be made by the civil engineer of the city, and reported to the council, who directs, or refuses to direct, its payment. If the engineer should delay unreasonably to make an estimate for a contractor, the council might instruct him to proceed to make it, or show that nothing had been done to be estimated. This is plainly inferable from the sections of the charter prescribing the duties of civil engineer; is expressly provided for by the by-laws of the corporation, is analogous to the proceedings in the construction, and payment therefor, of all our public works, and is peculiarly in accordance with the fitness of things. The council might, perhaps, hear evidence in opposition to an estimate of the engineer, but such is not the practice. Estimates fall within his province, as a man of science and art. If he be not such, in fact, he is unfit to be in the office.

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If estimates directed by the council, made by the engineer, and called for from the property holders by the contractor, are paid, no further proceedings are necessary. The bid for the work, and the contract, which can be inspected at all times by the property holders, as readily as can be the tax lists and mortgages upon property, inform owners or buyers, upon multiplication by the number of feet of ground owned on the street, the exact amount of lien on the lot till payment, and the exact amount each owner has to pay in all.

If estimates are not paid, at least final estimates, that fact, together with a statement of the fact that the estimate has been made, the amount thereof, the description of the particular lot or part of lot to which it is chargeable, &c., must appear to the council by affidavit; upon which affidavit the council orders a precept, &c. Acts 1857, p. 69. After the issuing of this precept, the property holder may appeal to the Common Pleas, where his cause may be tried upon the merits; except that he can not go behind the making of the contract to show irregularities. If any irregularities occur prior to that act, they must be taken advantage of by an injunction suit, before the work is performed. By omitting

thus to proceed, the party waives objection up to the making of the contract. This is the provision of the charter. § 69.

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Acts of corporate bodies are sometimes omitted to be entered of record. Generally, in such cases, if there is no prohibition in the charter, they may be proved by parol, if there are proper averments in the complaint. *Langsdale v. Bonton*, 12 Ind. 467. In the case at bar, the transcript of the record of the corporation constitutes the complaint; and did the transcript fail to show that all necessary steps had been taken, the questions would arise whether they could be proved by parol, without a complaint showing that the omitted steps had actually been taken; whether such complaint itself would be allowed; or whether the remedy would not be to apply to the council to have omitted entries made, *nunc pro tunc*, and a correct transcript filed in the Common Pleas. This latter course looks the most reasonable, and the party might be driven to it by a demurrer. In the case now before us, the transcript is sufficient.

A law, or amendment of a charter, relating to remedial proceedings, such as the practice on trial, rules of evidence, &c., may have immediate instead of prospective operation. Comparing now the action of the council in this case, so far as appears by the transcript, with the requirements of the charter, we find an omission which goes to the regularity and legality of the proceedings, viz., a failure on the part of the engineer or contractor to report the estimate to the council, and of the council to direct its payment. For this defect the demurrer was rightly sustained, and the plaintiff not amending, or asking leave for time to perfect the transcript on file, judgment of dismissal was rightly entered. The party will have to commence again, back of the first error.

Per Curiam.—The judgment is affirmed, with costs.

B. K. Elliott, for the appellant.

N. B. Taylor, J. Morrison and C. A. Ray, for the appellee.

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v.
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Where a party amends his pleading after a demurrer has been sustained to it, he can not complain of the action of the Court on the demurrer. Under § 364, 2 R. S., p. 120, the plaintiff may dismiss his suit in vacation, by filing a written dismissal with the clerk, as effectually as if dismissed in open Court.

Saturday,
November 30.

APPEAL from the *Hendricks* Common Pleas.

DAVISON, J.—*Hardwick*, who was the plaintiff, sued *St. John*, upon a promissory note for the payment of \$120. The note is dated April 25, 1856; was payable to one *Johnson A. Hayten*, who sold and delivered it to the plaintiff, without indorsement.

Defendant answered in abatement of the action, setting up, substantially, that *Hardwick* commenced a suit on the note sued on in this case in the *Hendricks* Circuit Court, in the year 1857, and at the *March* term thereof in that year recovered a judgment on said note against *St. John*, for \$104; that *St. John* appealed to the Supreme Court, and at the *November* term thereof, 1858, the judgment of said Circuit Court was reversed, and the opinion certified to that Court on January 26, 1859; that on the 29th day thereafter, *Hardwick* withdrew said note from the files of the Circuit Court, and commenced this action thereon, in the *Hendricks* Common Pleas, on January 31, 1859, and before the opinion of the Supreme Court had been spread on the record. To this answer there was a demurrer sustained; and thereupon the defendant, by leave, &c., filed his amended answer, as follows: "That the plaintiff ought not to have and maintain his action, &c., because he says, that at a term of the *Hendricks* Circuit Court, within and for the county of *Hendricks*, being the *March* term of said Court, 1857, the plaintiff impleaded the defendant in a civil action, and for the same cause of action in the complaint mentioned, as from the record of that Court appears; and that *Stephen Hardwick*, the then plaintiff, is the now plaintiff, and *James St. John*, the then defendant, is the now defendant; and that the suit aforesaid was pending in the said Circuit Court, at the

time of the commencement of this action in the Common Pleas. And at the *February* term, 1859, of said Circuit Court, the defendant, *James St. John*, recovered a judgment against said plaintiff for costs, &c., wherefore," &c.

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Plaintiff demurred to this amended answer; but the demurrer was overruled, and he replied: 1. By a general traverse. 2. That the suit by him against *St. John*, commenced in the *Hendricks* Circuit Court, was by said plaintiff duly dismissed, on *January 29*, 1859, and the dismissal thereof entered on the order book of said Court; a copy of which was filed with the reply, and made part of it, in these words:

Stephen Hardwick } No. 8.—Action on note; now pending
v. }
James St. John. } in the *Hendricks* Circuit Court.

The above named plaintiff hereby dismisses the above entitled suit, now pending in said Court, at his own costs, and directs the clerk of that Court to enter this order of dismissal upon the order book of the said court, according to the statute in such case made and provided.

"JANUARY 29, 1859.

(Signed,) "STEPHEN HARDWICK, *Plaintiff*."

*State of *Indiana*, *Hendricks* County, ss.

"I, *John Irons*, clerk of the Circuit Court of said county, certify that the above dismissal was filed in my office on *January 29*, 1859."

"JOHN IRONS."

And the plaintiff avers, that there was no suit pending in said *Hendricks* Circuit Court at the date of the commencement of this present suit, as alleged, &c., wherefore, &c. 3. "That there was not any suit pending in said *Hendricks* Circuit Court, of him, said plaintiff, against said defendant, at the time he, defendant, filed his answer herein," &c.

Demurrers to the second and third replies were overruled, and the defendant excepted. The issues were submitted to the Court, who found for the plaintiff; and, over a motion for a new trial, there was judgment. The errors are thus assigned upon the record: 1. The Court erred in sustaining the demurrer to the answer. 2. There was error in overruling

Nov. Term, the demurrer to the first and second replies. 3. The motion
1861. for a new trial should have been sustained.

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HARDWICK. There is nothing in the first assignment; because the defendant, having amended his answer after a demurrer had been sustained to it, has no right to complain of the action of the Court upon the demurrer. *Polleys v. Scope*, 4 Ind. 217; *Jay et al. v. The Indianapolis, &c. Railroad Co.*, at the present term. It may be noted, that § 382 of the Practice Act relates, alone, to demurrers overruled. 2 R. S., p. 123.

The second alleged error presents this inquiry: Did the entry of the order of dismissal in the order book of the Circuit Court, operate as a dismissal of the suit? We have a statutory rule of practice, which says: "The plaintiff may dismiss his action in vacation, by filing with the clerk a writing to that effect. The clerk shall enter such written dismissal in the order book, and the Court shall enter judgment, accordingly, at the next term. The plaintiff shall not be liable to the defendant for any costs made by him, after notice of the dismissal." 2 R. S., § 364, p. 120.

This section, as we understand it, affirmatively authorizes the plaintiff to "dismiss his suit in vacation;" and his "written dismissal" having been filed in the clerk's office, the suit stands dismissed, as effectually as if it had been dismissed in open court. In this instance, the writing filed by the plaintiff, seems to be in proper form, and the demurrer admits that it was duly entered upon the order book of the Circuit Court, before the present suit was instituted. The result is, the second reply is well pleaded.

But it remains to be considered, whether the third reply is, or not, demurrable. As we have seen, it alleges "that there was no suit pending at the time of the defendant's answer." This reply is plainly defective; so much so, that, in our opinion, the defendant, instead of demurring, should have moved to reject it. At all events, in looking into the record, it manifestly appears that "the merits of the cause have been fairly tried and determined in the Court below;" and, though the Common Pleas may have erred in its ruling

upon the demurrer to the third reply, we are not inclined, Nov. Term,
on that ground, to disturb the judgment. 1861.

Per Curiam.—The judgment is affirmed, with 5 per cent.
damages and costs.

J. S. Miller, for the appellant.

C. C. Nave and *J. Witherow*, for the appellee.

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Where there are two paragraphs in a complaint, to one of which affirmative answers only are pleaded, while the other is denied, if the plaintiff introduces any evidence having a tendency to support the latter paragraph, he is entitled to open and close the argument.

If the jury find for the plaintiff, upon one paragraph of his complaint, and do not, in terms, find upon the other paragraph, the plaintiff, having introduced evidence in support of the latter, and taken judgment on the verdict, will have as effectually precluded himself from bringing another suit for the same matter, as if there had been an express finding against him on the other paragraph.

In cases where there are several issues, any one of which being found for the defendant would defeat the plaintiffs' right to recover, all the issues must be found for the plaintiff, or he can not recover.

A party can not repudiate a contract on the ground of fraud and, at the same time, retain the benefits derived from it; but must, when he discovers the fraud, restore, or offer to restore, to the other party, what he has received, and failing to do this, he affirms the contract.

APPEAL from the *Wabash* Common Pleas.

WORDEN, J.—*Barnhart* sued *George Slocum* upon a promissory note made by the latter to the former, and also upon an agreement for the leasing of some land. Issue; trial by jury; verdict and judgment for the plaintiff.

Slocum having deceased, since the rendition of the judgment, his administrators appeal, and assign eighteen errors. The first and second of which relate to the ruling of the

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136	374
17	183
141	479
17	183
146	193
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Court in sustaining demurrers to the first and second paragraphs of the defendant's answer. We have not examined these paragraphs critically, with a view to their sufficiency, because there were other paragraphs of the answer, on which issues of fact were formed, under which the matters alleged in the first and second could have been proven, and under which the evidence was received. Hence, although the first and second paragraphs might be good, the defendant suffered no injury by the ruling. Ind. Dig., § 253, p. 658.

The third and fourth errors relate to the ruling of the Court in giving the plaintiff the opening and closing of the case, in the introduction of the evidence, and the argument of the cause to the jury. There were two paragraphs in the complaint. To the first the answers were affirmative; but to the second the general denial was pleaded, which threw the burden of proof upon the plaintiff, and entitled him to open and close the evidence. The plaintiff introduced some proof tending to sustain his second paragraph, and, hence, he was entitled to open and close the argument. *Vide Zehner v. Kepler*, 16 Ind. 290.

The fifth and sixth errors are, that the Court erred in overruling motions for a new trial, and in arrest of judgment. All the residue of the errors assigned, relate to the ruling of the Court in giving and refusing instructions.

The jury found for the plaintiff on the first paragraph of his complaint, and assessed as damages the amount due upon the note therein described; but did not find, in terms, upon the other paragraph. This was one of the grounds of the motion for a new trial, and the only ground of the motion in arrest.

Regularly, the verdict should respond to all the issues which the jury are sworn to try. But we think no error was committed in this respect of which the defendant could complain. The plaintiff recovered nothing upon his second paragraph, and if the defendant was injured by the fact that the jury did not specially find upon it, it must be because the verdict and judgment will be no bar to another suit brought for the same matter. We are inclined to think, though this point we do not decide, that a verdict in favor

of a plaintiff upon one paragraph of his complaint, without noticing the others, should be construed as equivalent to a finding against him on the others. But however this may be, it seems clear enough that the plaintiff, having offered evidence in support of his second paragraph, and having taken judgment on the verdict as it stood, has precluded himself from bringing another action for the matter embraced in his second paragraph, as effectually as if there had been an express finding against him on that paragraph.

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The case is entirely different from those where there are several issues, any one of which being found for the defendant, would defeat the plaintiff's right to recover at all. In such cases, all the issues must be found for the plaintiff, or he can not recover. One good defense, going to the whole cause of action, is as good as a score; and if any one of such defenses remain undetermined, the plaintiff can not have judgment, though all the rest be found for him.

We come now to the merits of the case, as involved in the motion for a new trial.

The note sued upon, and upon which the recovery was had, was given under the following circumstances.

The defendant had leased to the plaintiff a certain piece of land, containing about forty acres, for a year, or perhaps longer. Twenty-four acres of the land were to be sown with wheat, for which the defendant was to furnish one half of the seed. The residue of the land was to be planted with corn, the next season. The plaintiff went on and sowed the wheat, according to the terms of the contract. By the terms of the lease, the plaintiff was to have one half the grain to be raised on the premises, and the defendant was to build a house thereon for the use of the plaintiff. Some misunderstanding and controversy arising between the parties, they agreed between themselves to rescind the lease, and that the defendant should pay the plaintiff the reasonable value of the plaintiff's share of the twenty-four acres of wheat, and all reasonable expenses, and the damages, if any, which the plaintiff had sustained by reason of the lease. The parties not agreeing on the amount to be paid, they left it to the

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determination of two men, agreed upon between them as arbitrators, who awarded that the defendant should pay to the plaintiff two hundred and fifty dollars. For this amount the note was given. It is alleged by the defendant, and there is testimony having some tendency to prove it, that the award was fraudulent, and procured through corruption and collusion between the plaintiff and one of the arbitrators; which, it is alleged by the defendant, was unknown to him until after the giving of the note.

The consideration of the note was, undoubtedly, the surrender of the lease, &c.; the amount, however, was determined by the arbitrators. Now, however fraudulent the note may have been, or by whatever fraudulent means it may have been procured, the defendant could not, at the same time, repudiate the contract on the ground of the alleged fraud, and retain the benefit derived from it. He took back and retained the premises which he had leased to the plaintiff, and harvested and appropriated the wheat sown by the plaintiff, and also retained nineteen and one half bushels of wheat, which the arbitrators awarded that the plaintiff should return to the defendant, he having furnished that amount for seed, and which the plaintiff had returned accordingly.

There was a sufficient consideration to uphold the note. The note was valid for the whole amount, or, if fraudulently procured, was voidable, at the option of the defendant. When he discovered the fraud, it was his duty, if he designed to take advantage of it, to rescind the contract, and restore, or offer to restore, to the plaintiff, as far as possible, what he had received. By neglecting to do this, he affirmed the contract, and can not now avoid it. Says Mr. *Chitty*. "The election on the part of the defrauded party to rescind the contract, must be exercised as soon as the fraud is discovered; and if after the fraud practiced upon him has come to his knowledge, he deals with the subject matter of the contract, he can not repudiate the contract, although he subsequently discovers further circumstances connected with the same fraud." *Chitty on Cont.* p. 680; *Galling v. Newell*, 9 Ind. 572, and authorities there cited.

The verdict is so clearly right upon the evidence, in view of the position above discussed, that it is unnecessary to examine the charges given, or those refused.

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Per Curiam.—The judgment is affirmed, with 5 per cent. damages and costs.

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Orris Blake and *L. H. Goodwin*, for the appellants.

J. D. Conner, for the appellee.

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Errors of law occurring at the trial, can not be assigned for error in the Supreme Court, unless they were made the ground of a motion for a new trial in the Court below.

The granting of leave to amend the pleadings, while a cause is on trial, is a matter within the sound discretion of the Court, and unless it appears that the discretion has been improperly exercised, the Supreme Court will not notice the ruling.

Where, in an action to recover the possession of real estate, the defendant appears and pleads to the action, his possession of the land, described in the complaint is admitted, under § 597, 2 R. S., p. 167, and hence evidence of the boundaries of the land is irrelevant.

The act of 1855 (Acts 1855, p. 57) amending § 596, 2 R. S., p. 167, was not intended to change this rule, or increase the amount of evidence, but only to change the mode of pleading.

Where one party, without objection, permits the other to examine witnesses upon immaterial or irrelevant matters, he is himself in default, and can not afterward have the costs of such witnesses taxed against the party introducing them.

APPEAL from the *Ripley* Circuit Court.

Monday,
December 2.

DAVISON, J.—The appellees, who were the plaintiffs, brought this action against *Voltz*, alleging in their complaint that they were the owners in fee simple, and entitled to the possession of certain land in *Ripley* county, described as follows:

“Two acres and three eighths of an acre, off the east side of the southeast quarter of section 27, in township 9, and

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range 12, commencing at the northeast corner of said quarter section, as established by original survey under the authority of the *United States*, and running from thence along the east line of said quarter, as marked and established by the original survey under authority of the *United States*, to the southeast corner of said quarter; from thence north 160 rods, along the line run by *Pattison*, to a stake on the north line of said quarter, and thence four rods to the original corner of said quarter section, as established as aforesaid, containing, by actual survey, two and three-eighths acres of land, which is in the form of an acute angle, and that the defendant holds the land unlawfully and without right," &c.

The defendant answered thus: "that he is not the owner, nor is he in possession, of any part of the southeast quarter of section 27, in township 9, and range 12. He therefore denies each and every allegation in the complaint, and especially, he denies that he unlawfully and without right, holds the possession of any lands belonging to the plaintiff," &c. To this the plaintiff replied, that although it is true that the defendant is not the owner of the land described, &c., still he is in the wrongful possession thereof, and refuses to deliver possession of the same to the plaintiff; and the plaintiff again charges that he is the rightful owner in fee simple of said land, of which the possession is unlawfully withheld as aforesaid, &c.

Upon the issues thus formed, the cause was tried before said Court, at the *February* term, 1858. This trial resulted in a verdict for the plaintiffs; but a new trial having been granted, the cause was again tried at the *February* term, 1859, and the jury failing to agree, the issues were again, at the *August* term, 1859, submitted to a jury, who found for the plaintiffs. The defendant thereupon moved for a new trial, on four grounds: 1. The verdict is unsustained by the evidence. 2. The Court erred in its instructions to the jury 3. The Court refused to instruct the jury to find specially on particular questions of fact, as requested by the defendant. 4. The Court erroneously rejected evidence introduced by the defendant, and refused to admit evidence offered by

him. This motion the Court overruled, and the defendant excepted. Nov. Term,
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The plaintiffs, as appears by the evidence, were seized in fee of the east half of the southeast quarter of section 27, in township 9 north, of range 12 east. In this half quarter they allege the land described in the complaint to be included. It also appears that the defendant is the owner in fee simple of the southwest quarter of section 26, in the same township and range, and that a county surveyor named *Pattison*, had run a line between sections 26 and 27, called "the *Pattison* line." Between this and another line, alleged by the plaintiffs to be the original line established by survey under the authority of the *United States*, called "the old line," the land in controversy is situated; the plaintiffs claiming that section 27 is bounded by "the old line," and the defendant alleging "the *Pattison* line" to be the true line between the sections. Hence it became important to ascertain, by proof, the line which had been legally established between them; but the Court, while the trial was in progress, having intimated that the issues did not raise any question of boundary, the defendant thereupon filed an affidavit alleging, "*inter alia*," that that question was intended to be raised by the pleadings, and that the parties, and the Court in former trials of the cause, had proceeded on the idea that the question as to what was the true line between sections 26 and 27 was the only matter in dispute, and was fairly in issue. Upon this affidavit, the defendant moved "to reform the issue, by compelling the plaintiffs to amend their complaint as to the description of the land in contest; and also by allowing the defendant to amend his answer. The Court overruled the motion, and the defendant excepted.

As this decision does not appear to have been presented to the Court on the motion for a new trial, it can not be assigned for error. 2 R. S., § 352, p. 117; 12 Ind. 675; 14 *id.* 486; 15 *id.* 8. But aside from this objection, we are not inclined to hold the action of the Court erroneous. The cause being on its third trial, the granting of leave to amend the pleadings, while it was in progress, was evidently a matter within the sound discretion of the Court. 2 R. S.,

Nov. Term, § 99, p. 48. And, in this instance, there seems to be nothing
1861. in the record leading to the conclusion that that discretion

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has been improperly exercised. The record contains a bill of exceptions, which says that the plaintiffs offered no evidence touching the question of boundary, until the Court, over their objection, had admitted the evidence of one *Pattison*, who testified on that subject on behalf of the defendant; and that before the plaintiffs had concluded their testimony, the Court reconsidered its decision and decided that such evidence was inadmissible under the issues, excluded all further evidence on the subject of boundary, and struck out that which had been given. These rulings involve the controlling question in the case, namely, was evidence tending to prove the location of the section line between sections 26 and 27, pertinent to the issues in the cause?

The appellees contend that the defendant having appeared and pleaded to the action, his possession of the land, as described in the complaint, was admitted, and that evidence in proof of its boundaries was therefore irrelevant. The statute in relation to the recovery of real estate, contains these provisions:

"SEC. 596. The answer of the defendant must set forth under what claim of right, if any, he holds possession, and if as a mere tenant, the name and residence of the landlord must be given, and if he does not defend for the whole premises, he shall specify for what particular part he does defend.

"SEC. 597. Where the defendant makes defense, it shall not be necessary to prove him in possession of the premises." 2 R. S., pp. 166, 167.

In view of these rules of practice, it seems to follow, the defendant having made defense, that the position assumed by the appellees is correct. Because, proof of possession in the defendant being unnecessary, the boundaries of the land described by the plaintiffs, are, in effect, conceded, and evidence tending to prove their location must of course, be deemed immaterial. But the appellant refers to an act of 1855, which amends § 596, above quoted, in these words: "The answer of the defendant shall contain a general denial of

each material statement or allegation in the complaint; under which denial the defendant shall be permitted to give in evidence every defense that he may have, either legal or equitable." Acts 1855, p. 57.

It is said in argument, that the amendatory act annuls § 597, above recited, and thereby renders it necessary, in cases of this sort, to prove the defendant in possession of the premises. We think otherwise. The act of 1855 simply intends to change the mode of pleading; but not to increase the amount of evidence. And, moreover, § 597 is consistent, and not in conflict, with the amendatory act, and must therefore be allowed to stand, and be effective.

App'egate v. Doe, 2 Ind. 169, seems to be precisely in point. That case was ejectionment for lot No. 105, in *Connersville*. Upon the trial, evidence was given by both parties, as to where the correct line was between the lot then in controversy, and an adjoining one. The Court, in its opinion, says: "According to our statute, (quoting R. S. 1843, p. 708,) the defendant's possession of the premises, or of the part he defends, must be admitted. The evidence relative to the line between lot No. 105 and the adjoining one, was entirely irrelevant. If the defendant is not really in possession of any part of lot No. 105, this judgment will not affect him in any other way, except as to costs of suit." This exposition, it seems to us, is correct, and being so, it will at once be seen, that the Circuit Court, in rejecting the evidence, committed no error. *Doe v. Hall*, 2 *id.* 24; *Doe v. Hildreth*, *id.* 274.

At the proper time, the defendant moved for an order directing the clerk to tax up against the plaintiffs all fees of witnesses summoned by them, at the present and former terms of the Court, since the case has been pending for trial on the present issues; which motion the Court, as to such fees as have accrued during the present term, sustained, but, as to such as accrued at former terms, the motion was overruled, on two grounds: 1. The motion comes too late; it should have been made at the former terms. 2. The witnesses at said terms were examined without objection.

The second ground is well taken. Though the testimony

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of the witnesses was not pertinent to the issues, still, the defendant having made no effort in the resistance of their examination, is himself in default, and must be held liable under the general statutory rule, which says that "The party recovering judgment shall recover costs." 2 R. S., p. 126. Various other points are made in the appellant's brief, but what has been said in this opinion, is believed to be a decision upon "each question arising in the record."

Per Curiam.—The judgment is affirmed, with costs.
William S. Holman, for the appellant.

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Monday,
December 2.

APPEAL from the *Marion* Circuit Court.

Per Curiam.—Suit by *Vance* against the appellants, upon the covenants for the payment of rent contained in a lease executed between the parties. Judgment for the plaintiff, by default, the Court assessing the damages.

It is objected to the judgment, that there was no evidence showing that the defendants ever took possession of, or occupied the property under the plaintiff, or that they ever agreed to pay any thing for the premises, or that the premises were worth any thing.

The lease, which was executed by the defendants, bound them to pay rent in a much larger sum than that assessed by the Court, and further proof would seem to have been unnecessary; beside this, upon a default, the evidence offered in assessing damages does not necessarily, nor often, appear of record.

The judgment is affirmed, with 5 per cent. damages and costs.

J. Milner, for the appellants.

J. L. Ketcham and *J. Mitchell*, for the appellee.

SCARCE v. THE INDIANA AND ILLINOIS CENTRAL RAILWAY
COMPANY.

Nov. Term,
1861.

SCARCE

v.

THE INDIANA
AND ILLINOIS
CENTRAL
RAILWAY CO.

A., having made a cash subscription of \$3,000 to the stock of the railway company, was induced by an agent of the company to make a further subscription of a certain farm owned by him, upon the promise that his cash subscription should not be demanded until the road was completed. The company, not regarding their obligation to forbear, commenced suit on the cash subscription, and were proceeding to enforce the collection of a judgment recovered thereon. Suit by *A.* to recover the land, averring a tender of the stock taken for the land.

Held that the contract to forbear, being founded upon a valid consideration, might perhaps have been set up in defense of the action upon the cash subscription, and would certainly have furnished good ground for enjoining its collection until the completion of the road; but no such defense having been made, *A.* was not entitled to a rescission of the land subscription.

Held, also, that the company, having broken her contract, was liable for damages, and the complaint was sufficient to authorize their recovery.

APPEAL from the *Hendricks* Circuit Court.

Monday,
December 2.

DAVISON, J.—*Scarce*, who was the plaintiff, brought this action against the railway company, alleging, in his complaint, these facts: In *September*, 1853, and previous thereto, the plaintiff was indebted to the company \$3,000, for capital stock by him subscribed and taken. At the same time, he was the owner in fee simple of a tract of land in *Hendricks* county, (describing it,) which he offered to sell, in order to realize means of paying for the stock so taken. After this, the company, by one *Henry G. Tod*, her agent, proposed to the plaintiff, that he should subscribe one hundred and sixty-four shares of additional stock of the company, at \$50 each, and in payment therefor, convey to her the land described. This he refused to do, because, as alleged, he had reserved the land for the purpose of sale, and the application of its proceeds to the payment of the previous cash subscription of \$3,000. Thereupon the company, by her agent, for the purpose of cheating and defrauding him in that behalf, and fraudulently inducing him to subscribe such additional stock, falsely and fraudulently represented and agreed, that if he would take the additional stock and

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convey the land to the company, she would not ask or demand payment of the \$3,000, the cash subscription, until she had completed her road. And said agent then represented that he was authorized by the company's board of directors to make such agreement. It is averred that the plaintiff, confiding in said representations, and believing them to be true, when in truth they were false and fraudulent, did, as proposed by said agent, subscribe for one hundred and sixty-four shares of stock, of the estimated value of \$8,200, and in payment therefor, and in consideration that the company would forbear the collection of said \$3,000 until her railway was completed, he did convey the land described to the company, which was, and is, of the value of \$8,200. And the plaintiff in fact says, that the company failed to forbear the collection of the \$3,000, as stipulated by her agent; but has sued, and recovered a judgment for the same, and has assigned the judgment so recovered, to one *Butler*, who is pressing the collection thereof by execution, although the company has not, as yet, completed her road, or any part of it. And further, it is averred that the plaintiff, prior to the institution of this suit, tendered back to the company the one hundred and sixty-four shares of the stock, and demanded a reconveyance of the land, &c.

The relief prayed for is, that the contract whereby the plaintiff so parted with his land for stock, be rescinded; that the company be ordered to reconvey the land to the plaintiff, and that other relief be granted, &c. And further, the plaintiff demands damages, &c.

As we have seen, the fraudulent representations alleged in the complaint, do not refer to any fact existing at the time they were made; but they relate, alone, to the stipulation to forbear the collection of the \$3,000, until the railway was completed. These representations can not, therefore, have any effective bearing in the consideration of this case; because the company had full power to comply with her agreement to forbear, and having failed to do so, was, without reference to any such representations, simply guilty of a breach of contract. Has the plaintiff, in view of the alleged facts, an appropriate remedy? This is the only question to settle

in the case. The appellee contends that the plaintiff's claim for relief, if he ever had any, was against the action of the company for the recovery of the first subscription. This position is not strictly correct. True, the contract to forbear being, in this instance, founded upon a valid consideration, the plaintiff might, perhaps, have set it up in defense of that action. Evidently, he could have enjoined the collection of the \$3,000, until the railway was completed. But having failed to make any resistance to the suit for the first subscription, he is not, it seems to us, entitled to a rescission of the contract. The plaintiff, however, should not be adjudged remediless. The company, having broken her contract, by proceeding before the completion of her road to enforce the collection of the \$3,000, is obviously liable to an action for the recovery of damages. And, in our judgment, the complaint before us contains facts sufficient to authorize such recovery. And, as the measure of damages for the breach must depend upon the facts proved on the trial, we can not now say what that measure should be. In our opinion, the demurrer should have been overruled; and the result is, the judgment must be reversed.

Per Curiam.—The judgment is reversed, with costs. Cause remanded, &c.

J. M. Gregg and *P. S. Kennedy*, for the appellant.

J. Morrison, *C. C. Nave* and *J. Witherow*, for the appellee.

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Morrison
v.
Binninger.

MOFFITT v. BINNINGER and Others.

APPEAL from the *Marion* Circuit Court.

Monday,
December 2.

Per Curiam.—Suit by the appellees against the appellant on an account. Judgment for the plaintiffs by default, the Court assessing the damages.

It is objected, that process was not served in time. Service was had on *February 2*, the Court commencing on the

Nov. Term, 12th of the same month. This was sufficient. *Vide* Perk. 1861. Prac. 147, *et seq.*, and cases there cited. Again, it is claimed

SCHOONOVER
v.
QUICK. that a jury should have been called to assess the damages. In such cases, in actions founded on contract, the damages may be assessed by the court, a commissioner, or a jury. Code, § 367.

There is no error in the record.

The judgment is affirmed, with 5 per cent. damages and costs.

F. Rand and *R. Hall*, for the appellant.

John L. Ketcham, for the appellees.

SCHOONOVER, Administrator of STRAIN v. QUICK.

A set-off may be pleaded to an action by an administrator.

Monday,
December 2.

APPEAL from the Warren Common Pleas.

DAVISON, J.—This was an action by *Schoonover*, as administrator of the estate of *Samuel Strain*, deceased, against *Quick*. The complaint contains two counts. The first is for money paid by the intestate in his lifetime as surety for the defendant, and for his use; and the second is upon a note executed by the defendant to the intestate, while in life, for the payment of \$100. Defendant answered by eight paragraphs. To all of which, except the fifth, sixth and seventh, the plaintiff demurred; but his demurrers were overruled, and he excepted. Replies, in denial of the answer. Verdict in favor of the plaintiff for \$43, upon which the Court, over a motion for a new trial, rendered judgment. The plaintiff appeals to this Court.

The action of the Court in overruling the demurrer to the eighth paragraph of the answer, is mainly relied on for a reversal of the judgment. That paragraph alleges "that the intestate, in his lifetime, was, and his estate, since his death, has been, and still is, indebted to the defendant, \$217,

for money lent and advanced, and for goods sold and delivered, of which a bill of particulars is filed, &c., and he now offers to set off so much of said indebtedness as may be necessary to satisfy the plaintiff's claim, &c.

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DENNY
v.
GRAETER.

Against the validity of this defense, it is insisted that a set-off is not pleadable to an action by an administrator. We think otherwise. The statutory rule is, "When cross demands have existed between persons, under such circumstances that one could be pleaded as a counter claim, or set-off, to an action brought upon the other, neither can be deprived of the benefit thereof, by the assignment or death of the other, and the two demands must be deemed compensated, so far as they equal each other." 2 R. S., § 61, p. 41. This provision, it seems to us, plainly authorizes the defense in question, and the result is, the demurrer was not well taken. The evidence given in the cause is in the record, and having examined it carefully, we are of opinion that it sustains the verdict. Other errors are assigned; but the verdict being right, on the evidence, they will not be further noticed.

Per Curiam.—The judgment is affirmed, with 5 per cent. damages and costs.

J. H. Brown and J. Park, for the appellant.

Bryant & Chandler, and *Gregory and Harper*, for the appellee.

DENNY and Another v. GRAETER.

APPEAL from the *Knox* Common Pleas.

Monday,
December 2.

Per Curiam.—Where process is returnable at the next term of the Court, it is not vitiated by naming an erroneous day for the sitting of the Court. The party is bound to know the true day as matter of law. *Perk. Prac.* 149; *Rigbee v. Bowler ante*, p. 167.

Nov. Term, 1861. The failure of a Court to sit at an appointed term, does not work a discontinuance of a cause. Ind. Dig., pp. 676, 677; 2 R. S., § 16, p. 7. Appearance after a discontinuance waives it. Perk. Prac. 100.

LOOMIS
v.
DONOVAN.

The judgment is affirmed, with 1 per cent. damages and costs.

William Harrow, for the appellants.

Samuel Judah, for the appellee.

LOOMIS and Another v. DONOVAN.

P. gave a mortgage to *D.* upon real estate, to secure the payment of \$100, on or before *November 15, 1859*, and \$140, on or before *August 19, 1860*; the purchase money of the mortgaged premises. No note, bond or other instrument was made by *P.* for the payment of said sums. On *July 27, 1860*, *P.*, *D.* and *L.* made a verbal agreement, by which *L.* was to purchase the mortgaged premises, subject to the mortgage, assume the payment of the mortgage debt, and pay *D.* \$50, on demand. *D.* agreed, on his part, to extend the payment of the balance of the mortgage debt, until *July 1, 1861*. In accordance with this agreement, *L.* purchased the mortgaged premises, and paid *D.* the \$50. Before the expiration of the time agreed upon, *D.* brought a suit for the foreclosure of the mortgage against *P.* and *L.* *L.* answered, setting up the foregoing facts.

Held, that the agreement was valid and binding, and suspended *D.*'s right to foreclose until the expiration of the time to which payment was agreed to be extended.

Held, also, that a suit to foreclose is an appeal to the equity powers of the Court; that the suit in this case was brought in bad faith, in fraud of the rights of *L.*, and that upon the defense set up being established, it should have been dismissed without prejudice.

Monday,
December 2.

APPEAL from the *Cross* Common Pleas.

PERKINS, J.—Suit to foreclose a mortgage, which was the sole written evidence of the debt, no note or bond having accompanied the mortgage. The suit is against *W. A. Parry* and *C. C. Loomis*. The mortgage was given by

Parry to Donovan. After it became due, *Donovan* agreed by parol with *Parry* and *Loomis*, all three being together, that if *Parry* would sell, and *Loomis* would purchase *Parry's* equity of redemption in the mortgaged premises, assume *Parry's* mortgage debt, and pay \$50 down upon it, he would extend the time of payment of the balance, and the foreclosure, until *July 1*, 1861. The agreement was concluded between the three. *Loomis* made the purchase of the equity of redemption, assumed *Parry's* mortgage debt, and paid \$50 upon it.

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1861.

LOOMIS
v.
DONOVAN.

Donovan did not delay the foreclosure suit till *July 1*, 1861, and *Loomis*, one of the defendants, sets up the foregoing facts in answer to the action. The Court below held them no bar, and gave judgment of foreclosure and sale. Was the ruling of the Court right? This is the only question.

The point is this. A creditor who holds a sealed obligation for the debt, past due, agrees with the debtor, by parol, for a valuable consideration, viz., that he procure a third person to perform an act, that he will extend the time of payment; and he agrees, in like manner, with such third person, that, if he will do the proposed act, time shall be given on the debt, as to him. Here, then, is an agreement by parol, with an existing, and substantially a new debtor, for a consideration which is executed, at least in part, to give time, as against both of them, on an existing bond debt, till a given day, and the question is, will a Court of equity give effect to it? It does not involve the question of discharging sureties; but of how far the debtor and a new surety can have the benefit of an agreement for time. See, as to giving time where sureties are concerned, *Halsstead v. Brown*, *post*, p. 272; and where they are not, *Mendenhall v. Lenwell*, 5 Blackf. 125.

It is settled law, that giving time to the principal by a binding contract, though made after breach, discharges the surety. Why? Because it is said that the surety has two rights, under the contract as originally made, at common law, viz., to pay off the debt as soon as it becomes due, or at any time afterward, and then immediately sue the principal to recover back his money; or, to apply to chancery

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for the collection of the debt by the creditor, in which suit the creditor and principal debtor are brought before the Court immediately; and that a valid contract by the creditor, extending the time of payment to the principal, ties up the hands of the former, so that he can not enforce payment of the contract when thus brought into chancery, and that the surety can not enforce it, and, hence, is injured by the act of giving time. *Leading Cases in Equity*, Vol. 2, Part 2, p. 362, side p. 716. It is thus evident, that equity will not enforce a contract upon which time has been validly given, till the extended time has elapsed. And this doctrine of discharging sureties because of the extension of time to the principal, in a contract which forbids its enforcement within such time, was of chancery origin, (*Dickerson v. The Board, &c.*, 6 Ind. 128) and belonged intrinsically to equity. 1 *Eden on Injunctions*, 3d ed. p. 65. And it made no difference, that time was given by parol upon a contract under seal. *Leading Cases in Equity*, Vol. 2, Part 2, top p. 369; *Burge on Suretyship*, p. 212. Later, the doctrine was applied at law to the extent of releasing the sureties, but not to the extent of suspending the action at law against the principal, where the new contract was made after breach of the original. *Dickerson v. The Board, &c.*, *supra*. But see *McComb v. Kittridge*, 14 O. Rep. 348. And see *Rigbee v. Bowler*, *ante*, p. 167. Perhaps equity would grant an injunction to restrain the action at law against the principal, till the extended time had elapsed. *Burge on Suretyship*, p. 208. "This doctrine, (says the Supreme Court of *Vermont*), which is derived from chancery, is founded on the obligation which the contract for delay imposes upon the conscience of the creditor to perform it." *Austin v. Dorwin*, 21 *Vermont*, 38. And such are the contracts which chancery was originally created to enforce; but chancery will never lend its aid to enforce a contract "in opposition to conscience or good faith." *Creath's Adm'r v. Sims*, 5 How. (U. S.) Rep. 192. It would be in opposition to conscience and good faith to enforce a contract in opposition to an agreement, for a valuable consideration, to give an extension of time.

A suit to foreclose is an appeal to the equity powers of the

Court. The present is a chancery suit. It is brought in bad faith, in fraud of the rights of *Loomis*. The plaintiff does not come into Court with clean hands. He has not done equity. His suit, upon the defense set up being established, should be dismissed without prejudice.

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SMITH
v.
ELSAS.

It is a general proposition of law, that parol evidence may be given to rebut an equity. See *Page v. Lashley*, 15 Ind. 152.

Browne, in his valuable work on the Statute of Frauds, says: "And while it is not accurate to say that the verbal agreement will be always admitted as a defense in those courts, (equity courts,) since that would be to relieve them from the binding power of the statute, it seems to be clear that they will not lend their aid to enforce and perfect a legal right, which the plaintiff sets up against his conscientious duty under a verbal contract interposed on the part of the defense." p. 133.

Per Curiam.—The judgment is reversed, with costs. Cause remanded, &c.

E. Walker, for the appellants.

John Guthrie, for the appellee.

SMITH and Another v. ELSAS and Another.

APPEAL from the *Marion* Common Pleas.

Monday,
December 2.

Per Curiam.—It is claimed in this case that the damages were excessive; that the judgment is for too much. Excessive damages is a ground for a new trial in the Court below; but it must be moved for in that Court. Such motion was not made in this case. No exceptions were taken below.

The judgment is affirmed, with 1 per cent. damages, and costs.

R. L. Walpole, for the appellants.

W. Henderson, for the appellee.

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1861.

OVERTON and Another v. BEHYMER.

HALSTED
v.
BROWN.

Monday,
December 2.

APPEAL from the *Marion* Circuit Court.

Per Curiam.—The judgment in this case is affirmed, on the case of *Rigsbee v. Bowler*, *ante*, p. 167.

It should be observed, that this suit was pending when the act on the subject of jurisdiction, in the Laws of 1861, p. 48, was passed. It may be further observed, that the judgment below was upon a default, and no motion to set aside has been made.

Judgment is affirmed, with 5 per cent. damages and costs.

David Snyder, for the appellants.

F. Rand, for the appellee.

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HALSTED v. BROWN.

No other judge than the one who tried the cause can correct a bill of exceptions.

It is only by virtue of our statute, that a surety may give notice to the creditor to sue, and secure his release if suit is not brought. No such doctrine was recognized in this State as a part of the common law, and under the statute the notice must be in writing.

The giving of time by the creditor to the principal debtor will discharge a surety only when the agreement was upon a valid consideration; and a promise to pay illegal interest, or the paying up of interest already due, is not such a consideration.

Monday,
December 2.

APPEAL from the *Sullivan* Common Pleas.

PERKINS, J.—This was a suit upon a promissory note, made in *Ohio*, and bearing 10 per cent. interest upon its face. The suit was against a surety. Judgment below for the plaintiff. The amount involved invited and justified the very elaborate and able briefs that have been filed, but the case is a plain one. A bill of exceptions was corrected and signed by the judge who tried the cause.

The appellant contended that the bill was incorrect, and procured a mandate from the Supreme Court to the judge below to correct it, or show cause, &c. The mandate was served, but no return was made by the judge. On a rule for attachment, the return was, that the judge was dead. If the judge who tried the cause could have corrected the bill without the consent of both parties, a point we do not decide, (see *Huston v. The Cincinnati, &c., Co.*, 16 Ind. 275,) we think no other judge could, and that the remedy in that particular was at an end. See Perk. Prac. 312; *ex parte, Bradstreet*, 4 Pet. Sup. Ct. (U. S.) Rep., p. 102. The judge signs, or refuses to sign, a bill of exceptions upon his own recollection of the facts of the case, refreshed as it may be from any sources existing.

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The defenses set up in bar of the suit were: 1. Usury. 2. Failure to sue the principal, upon notice. 3. Giving time to the principal, without the consent of the surety.

The note, as we have seen, drew 10 per cent. interest. It was shown by a statute of *Ohio*, that this rate was legal. It was proved, however, that the maker of the note actually paid, by agreement with the payee, 12 per cent. But usury, it was shown by the *Ohio* statute, did not vitiate the note, but might be applied as payment upon the principal sum. It was so applied in this case. See *Clearwater v. Cloon*, 2 Handy's O. Reports. There is no such doctrine recognized in this State, as a part of the common law, that a surety by giving notice, either verbal or written, to the creditor to sue, can secure his release. It was not shown that any written notice was given by the surety to the payee to sue, nor were the terms of any verbal notice even shown. But the notice, to be of any effect, should have been in writing. Ind. Dig., p. 703; *Craft v. Dodd*, 15 Ind. 380; *Colereck v. McCleas*, 9 Ind. 235; *Rome v. Buchtel*, 13 Ind. 381; Greenleaf's Overruled Cases, case "*King v. Baldwin*," p. 211 of 3d ed. This is because the notice is of any effect, simply by virtue of our statute; and that gives effect only to a notice in writing. Leading Cases in Equity, Vol. 2, Part 2, top p. 378.

As to the giving of time, it must be by a new promise, founded upon a valid consideration, to operate to discharge the

Nov. Term, 1861. **SMALLHOUSE v. THOMPSON.** surety. Otherwise, he is not prejudiced. *Kirby v. Studebaker*, 15 Ind. 45. Giving time upon a promise to pay illegal interest, is not upon a valid consideration. *Shaw v. Binkard*, 10 Ind. 227. Giving time upon paying up interest already due, is not upon a valid consideration. *Shook v. The State*, 6 Ind. 113; *Shook v. The Board, &c.*, *id.* 461; *Dickerson v. The Board, &c.* *id.* 128. In the case at bar, we are satisfied no interest was paid in advance. See *McComb v. Kittridge*, 14 O. Rep. 348.

Per Curiam.—The judgment is affirmed, with 1 per cent. damages and costs.

S. Coulson, for the appellant.

Scott and Gunn, for the appellee.

SMALLHOUSE and Others v. THOMPSON and Another.

Suit by an assignee upon a promissory note. Answer: that the payee of the note had notified defendant, that the alleged assignment to the plaintiff was not valid, and that he must not pay, &c., and asking that the payee be made a party.

Held, that under 2 R. S., § 23, p. 32, the application to have the payee made a party should have been made upon affidavit, before answer.

Tuesday,
December 3.

APPEAL from the *Allen* Circuit Court.

HANNA, J.—Suit on note. Answer: 1. That the note was given to the appellees in consideration of goods, &c., purchased of *O'Conner & Bro.*, from whom appellees pretended they had the claim by assignment, and that *O'Conner* had notified defendants that such pretended assignment was not binding, and that they must not pay, &c., and asking that *O'Conner* be made a defendant; and averring that they are ready to pay, and bring the money into Court. 2. Want of consideration. A demurrer was sustained to the first paragraph of the answer, and issue formed on the second. Trial;

finding for the plaintiffs. Judgment was not entered of record at the term of the finding, but at the next term was ordered to be entered *nunc pro tunc*. Nov. Term,
1861.

It is now objected that the court erred in sustaining the demurrer, in the finding and judgment for the plaintiffs, and in causing such entry *nunc pro tunc*. SPARKS
V.
McFARLAND.

The statute, 2 R. S., § 23, p. 32, seems to require that a defendant should, by affidavit, before answer, bring into court any one, not a party to the suit, who makes against him a demand for the same cause of action. Here, no affidavit was filed. The answer was not sworn to, if that could be considered a substantial compliance with the statute.

There was no error in sustaining the demurrer. After that ruling, there was nothing before the Court showing that the money was brought into Court. The finding was, therefore, right; and, so far as the record shows, there is no error disclosed in ordering the judgment entered as of the previous term. There are no facts shown, by bill of exceptions, or otherwise, upon which the Court acted; we must therefore presume in favor of that action.

Per Curiam.—The judgment is affirmed, with 5 per cent. damages and costs.

L. M. Ninde and H. W. Puckett, for the appellants.

W. H. Coombs, for the appellees.

SPARKS v. McFARLAND and Others.

APPEAL from the *Vigo* Common Pleas.

Per Curiam.—Suit by the appellees against the appellant, upon two promissory notes, executed by *Sparks* to the appellees. Tuesday,
December 3.

Judgment for the plaintiffs.

The error relied upon, to reverse the judgment, relates to the costs.

One of the notes was found to be usurious, while the

Nov. Term, other was not. The defendant moved to tax all of the costs
1861. to the plaintiffs. This motion was overruled; but the Court
KELLER taxed to the plaintiffs such costs as seem to have been
v. made in consequence of the usurious note being joined in
MILLER. suit with the other. This seems to us to have been right.
 There is no error in the record.

The judgment is affirmed, with 5 per cent. damages and costs.

Chas. E. Hosford and Putnam Brown, for the appellant.

KELLER v. MILLER.

To an action of replevin for a horse, the defendant answered that at and before the commencement of the suit, and until the horse was taken upon the writ, the same was in another county, &c.

Held, that the question presented by the answer was one of fact, in abatement, and must have been pleaded, or it would have been waived.

Held, also, that pleas in abatement must be filed in their order, and can not be pleaded either with, or after, pleas in bar.

Where the interest in the cause of action is transferred, pending the suit, no additional pleading is required, except, perhaps, to show the transfer.

Tuesday,
December 3.

APPEAL from the *Wabash* Common Pleas.

WORDEN, J.—Action by *Miller*, against *Keller*, to recover possession of a certain mare. Trial; verdict and judgment for the plaintiff.

The suit was originally commenced by *Robert A. Howard*, as plaintiff, but after the commencement of the suit he sold the mare to *Miller*, who, on petition filed, setting out the facts, was substituted as plaintiff, in the place of *Howard*, with a stipulation that the defendant might testify in the cause as a witness, as well as the original plaintiff. No objection was made to the order substituting *Miller* as plaintiff in the action. This order was justified by the statute. Code, § 21.

Miller then filed an amended complaint, setting out the original cause of action in favor of *Howard*, and averring

that *Howard*, on *March* 31, 1860, which was after the commencement of the suit, being then in possession of the mare, sold and delivered her to him, said *Miller*.

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1861.

The defendant answered the original and amended complaint:

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v.
MILLER.

First: Admitting the sale and delivery of the mare by *Howard* to *Miller*, but alleging a sale and delivery of the mare by *Howard* to the defendant, before the commencement of the suit, by virtue of which sale the defendant claims title in himself.

Second: That on *February* 18, 1860, and before the commencement of this suit, and afterward, until the same was taken by an order of delivery of this Court, in this action, the mare in controversy was not in the county of *Wabash*, and State of *Indiana*, but in the county of *Huntington*, in said State; wherefore, the defendant prays that the mare be returned to him, and that the order of delivery in the cause be quashed, except so far as it may operate as a summons.

The plaintiff replied to the first paragraph of the answer, and demurred to the second; the demurrer was sustained, and the defendant excepted. This ruling presents the only question arising upon the record.

By the second paragraph of the answer, the defendant seeks to raise the question of jurisdiction in the Court below, to issue an order for the replevin of property, where, at the time of issuing the writ, it is detained in another county. We shall not examine this question, as it does not legitimately arise. This was a question of fact, pleaded in abatement of the writ. It must have been pleaded, otherwise it would have been waived. *Ludwick v. Beckamire*, 15 Ind. 198. Pleas in abatement must be filed in their order, and can not be pleaded either with, or after, pleas in bar. Pleading in bar is a waiver of matter of abatement. *Carpenter & Love v. The Mercantile Bank*, *post*, p. 253; *Jones v. The Cincinnati Type Foundry Co.*, 14 Ind. 89. Here, the defendant had answered to the merits, and could not, therefore, raise any question in abatement.

But it is insisted that the complaint is bad. The ground taken is, that *Miller*, after being substituted as plaintiff,

Nov. Term, 1861. should have filed a supplemental complaint, setting out the proceedings on the original complaint, and showing how

RICHARDSON *Howard* came into possession of the mare, after the alleged wrongful taking and detention. Section 102 of the Code is
v. relied upon. We do not think that section has any applica-
STOUT. tion to the case. "In case of death, marriage or other disability of a party, the Court on motion, or supplemental complaint, at any time within one year, or on supplemental complaint afterward, may allow the action to be continued," &c. "In case of any other transfer of interest, the action shall be continued in the name of the original party; or, the Court may allow the person to whom the transfer is made, to be substituted in the action." Code, § 21. This case comes within the latter branch of the above provision, and in such cases, no additional pleading is required, except, perhaps, to show the transfer, which was done here.

A question is argued by counsel, as to the ruling of the Court in refusing to give the defendant the opening and closing of the evidence and the argument. The question does not legitimately arise, as there is no bill of exceptions showing the ruling complained of.

Per Curiam.—The judgment is affirmed, with costs.

Orris Blake, M. H. Kidd and Ben. S. Nicklin, for the appellants.

J. D. Conner and C. S. Parrish, for the appellee.

RICHARDSON v. STOUT.

Tuesday,
December 3.

APPEAL from the *Grant* Common Pleas.

Per Curiam.—Suit to foreclose a mortgage. Judgment of foreclosure and sale. Appeal for time.

The proceedings were marked by more than ordinary accuracy. The statute closely followed. See *Perk. Prac.* 645, *et seq.*

The judgment below is affirmed, with 5 per cent. damages and costs. Nov. Term,
1861.

H. D. Thompson, for the appellant.

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v.
PHILLIPS.

CULPH and Others v. PHILLIPS and Another.

Where, in a suit for the foreclosure of a mortgage, the mortgagor has not sold his equity of redemption, it is not necessary to aver in the complaint that the mortgage has been recorded.

Payment of a sum of money exceeding legal interest, for a further extension of time upon a note past due, does not taint the note with usury, but the maker may, probably, have a credit for the amount, as a payment.

It will be presumed in favor of the judgment of a court of general jurisdiction, the record not showing the contrary, that the land, in a foreclosure suit, was situated within the jurisdiction of the court.

Where a note, secured by mortgage, is payable without relief from the appraisement laws, and the complaint prays for a foreclosure, and other proper relief, a judgment of sale without relief is not erroneous.

APPEAL from the *Jasper* Circuit Court.

Tuesday,
December 3.

PERKINS, J.—In *June*, 1856, *Elijah Culph*, and *Sarah* his wife, mortgaged a piece of land in *Jasper* county, *Indiana*, to *William Moreland*, to secure the payment of four notes, due at the times following, viz., one on *April* 1, 1856; one on *April* 7, 1857; one on *April* 1, 1859; and one on *April* 1, 1860.

This suit was commenced in *June*, 1860. *Moreland* assigned one of the notes to *Thompson*, who assigned the same, by delivery, to *Phillips* and *Webb*, the plaintiffs. *Culph* and wife, the mortgagors, *Moreland*, the mortgagee, and holder of a part of the secured notes, *Thompson*, the assignee, and equitable assignor, of one of the notes, are made defendants. *Culph* had not sold his equity of redemption; and, hence, no purchaser from him had any interest in the land. It was not, therefore, necessary to aver in the complaint, that the mortgage had been recorded. It was good against the mortgagor, without having been recorded.

Payment, to the holder, of a sum of money exceeding legal

Nov. Term, 1861. interest, for a further extension of time upon a note past due, does not taint the note with usury. See the cases cited in Ind. Dig., § 2, p. 778. But the maker may, probably, have a credit for the amount, as a payment. We presume in favor of the judgment of a court of general jurisdiction, the record not showing the contrary, that the land, in a foreclosure suit, was situated within the jurisdiction of the Court. *Godfrey v. Godfrey*, ante, p. 6.

DUCK
v.
THE STATE.

Where a note is given without relief from valuation laws, and secured by mortgage, and the complaint for foreclosure prays for a foreclosure, sale, and other proper relief, a judgment of sale without relief may be rendered.

Per Curiam.—The judgment below is affirmed, with 2 per cent. damages and costs.

John Guthrie, for the appellants.

R. C. Gregory, for the appellee.

DUCK v. THE STATE, on the relation of DILL.

On the trial of a prosecution for bastardy, it appeared that the child was born on September 18, 1858. The defendant offered to prove that in the first week in November, 1857, the relator had had sexual intercourse with another man.

Held, That the testimony was rightly rejected.

Friday,
December 3.

APPEAL from the Dearborn Common Pleas.

PERKINS, J.—*Mary Jane Dill* caused a prosecution to be instituted against *Robert Duck*, for bastardy. *Mary* had given birth to her child. It was born on September 18, 1858; December 18, 1857, would have been nine months previous. On the trial, the defendant offered to prove that *Mary Jane* had had sexual intercourse with another person, in the first week of November, 1857.

We think the Court rightly rejected the evidence. It is true, experience proves that the period of gestation is almost as variable in individual cases, though within narrow limits, as that of the length of human life; but the longest

period we have ever known to be judicially allowed, was 313 days. See the case of *The Commonwealth v. Hoover, Lewis'* Nov. Term, 1861.
U. S. Cr. Law, p. 48. In the case at bar, the evidence proposed might have covered a period of 322 days.

Per Curiam.—The judgment is affirmed, with 10-per cent. damages and costs.

D. S. Major, for the appellant.

FOWLER
v.
HAWKINS.

FOWLER and Another v. HAWKINS.

The Court does not, ordinarily, attempt to control a party as to the order in which he shall introduce his evidence.

Where a grain rent is reserved in a lease, with a condition that the lessor shall hold the crop as security for the rent, the lien attempted to be reserved for the rent would be inoperative as to a purchaser in good faith, without notice, but would be good against a naked wrong doer, who would have no claim but possession, derived through the wrongful act.

APPEAL from the *Tipppecanoe* Circuit Court.

Tuesday,
December 3.

HANNA, J.—This case has been here before. See 11 Ind. 316, for facts. It was then decided, that a *bona fide* purchaser, for a valuable consideration, might acquire from *Wright*, the lessee, a title to the corn in controversy, if sold by him without having procured the consent of *Hawkins*, the lessor.

Upon the second trial, the material question was, whether such a sale had been made by the lessee. *Wright*, and *Ford*, his immediate vendee, were both witnesses, and their evidence upon that point was contradictory. The jury found for the plaintiff; and we cannot disturb the judgment on the ground that it was not supported by the evidence.

It is said the lease between *Hawkins* and *Wright* ought not to have been admitted as evidence. We do not perceive that there was any error in that ruling. Whether the lease could have force as evidence, toward showing a lien, depended upon whether it was followed by other testimony, as to notice, &c. . But the Court does not, ordinarily, attempt to control a party, as to the order in which he shall introduce

Nov. Term, 1861. his evidence. It was competent for another purpose, namely, to sustain *Wright* as to the amount of rent reserved.

**FOWLER
V.
HAWKINS.**

The following instruction it is argued is erroneous: "The real question in this case, and, indeed, the only material one for the consideration of the jury, is whether the witness *Wright*, sold to the witness *Ford*, through whom the defendants claim title, the corn which was to be delivered to *Hawkins* for rent; and if you shall believe from the evidence that *Wright* reserved the corn, which was to go to *Hawkins*, then *Ford* could not, by taking possession of all the corn as a wrong doer, and selling it to *Fowler* and *Earl*, confer any title on them as against *Hawkins*, which would avail them in this case."

It is said that this charge ignores the fact that *Hawkins* had never been put in possession of the corn which he was to have for rent; and, consequently, does not require him to depend upon the strength of his title to recover.

There are other instructions which fairly presented the right of the lessee to sell the corn by him raised, even including that which was to be paid as rent; the rights acquired therein by the purchaser and those claiming under him; that the same was superior, in behalf of a *bona fide* purchaser &c., to the lien attempted to be created in favor of the lessor.

We think, taking the instructions all together, that the question was presented in a manner not to be misunderstood by the jury, whether the corn in controversy, the rent corn, was sold by *Wright* to *Ford*, or not, and whether it was taken possession of by *Ford*, or those claiming under him, under color of right, or as naked wrong doers?

We suppose the provisions of the lease attempting to secure a lien upon the whole crop, would be inoperative as to good faith purchasers, without notice, &c.; but certainly, the lien would be good against a naked wrong doer, who would have no claim but possession, derived through his wrongful act, as to the crop, or that portion of it, the possession of which was thus acquired.

Per Curiam.—The judgment is affirmed, with costs.

R. C. Gregory, H. W. Chase and J. A. Wilstach, for the appellants.

W. C. Wilson and Geo. Gardner, for the appellee.

URTON v. LUCKEY.

Nov. Term,
1861.CATTERLIN
v.
DOUGLASS.

If a demurrer be to the whole pleading, and there is one good paragraph, it should be overruled.

A motion to tax costs can not be noticed in the Supreme Court, unless there be a bill of exceptions showing the ruling of the Court below.

APPEAL from the *Wells* Common Pleas.

Tuesday,
December 8.

WORDEN J.—Suit by the appellee against the appellant, on a special contract, and for work and labor. Trial by jury; verdict and judgment for the plaintiff, for \$33.26.

Two grounds only are urged for the reversal of the judgment. First, that the Court erred in overruling a demurrer to the third paragraph of the complaint; and, second, that the Court erred in refusing to tax the costs to the plaintiff.

The demurrer was to the entire complaint, and not separate to the third paragraph. If the third paragraph be bad, there was no error in overruling the demurrer, the others being good.

In reference to the costs, the clerk states in the transcript that a motion was made to tax the costs to the plaintiff, and overruled, and that the defendant excepted.

There is no bill of exceptions showing these matters; and without a bill of exceptions, as has been held in several cases, they are no part of the record, and cannot be noticed by this Court.

Per Curiam.—The judgment is affirmed, with costs.

L. M. Ninde and *H. W. Puckett*, for the appellant.

M. Jenkinson, for the appellee.

CATTERLIN v. DOUGLASS.

An action will lie by a mere rightful possessor, against a wrong doer, for any injury to the possessor's rights.

Where real estate is sold for taxes, when the owner has personal property in the county subject to sale, which is not sought for by the officer, the purchaser derives no title.

Nov. Term,
1861.

CATTERLIN
v.
DOUGLASS.

A sheriff's deed may be given in evidence before the judgment and execution upon which the sale was made are introduced, and if, on the trial, the production of the judgment and execution are waived, it would not be error for the Court to refuse to instruct the jury that the case was not made out for want of such evidence.

Where the Court refuses instructions, and the evidence is not in the record, the Supreme Court will, as a general rule, presume the ruling to be correct.

Tuesday.
December 3.

APPEAL from the *Clinton* Circuit Court.

Per Curiam.—*Douglass* sued *Catterlin* for entering his close and taking away a boiler, engine and mill. *Catterlin* answered, 1. The general denial; 2. Setting up title in himself. Reply, in denial. Trial by jury; judgment for the plaintiff. The evidence is not all in the record, nor is a special case made.

An action will lie by a mere rightful possessor, against a wrong doer, for an injury to the possessor's rights. *Case v. Weber*, 2 Ind. 108.

It is not shown whether the engine, &c. were so attached to the realty as to become a part of it, and in favor of the judgment we may presume that they were shown to be personal property.

A tax title is good for nothing where real estate is sold for taxes when the owner has personal property subject to sale, in the county, which is not sought for by the officer. A sheriff's deed may be given in evidence, as a link in the chain of evidence, before the judgment and execution are introduced, if the Court sees fit to permit this order of proof to be adopted; and if, on the trial, when this is done, the production of the judgment and execution are waived, it would not be error in the Court to refuse to instruct the jury that the case was not made out because the judgment and execution were not produced. Where the Court refuses instructions, and the evidence is not upon the record, the general rule is that the Supreme Court must presume their refusal correct.

The judgment is affirmed, with 1 per cent. damages and costs.

J. E. McDonald, *A. L. Roache*, and *Simms & Davidson*, for the appellant.

N. Purdum and *S. C. Wilson*, for the appellee.

CHANDLER v. KEATON.

Nov. Term,
1861.APPEAL from the *Shelby* Common Pleas.

HAZELRIGG

v.

WAIN-
WRIGHT.*Per Curiam*.—The judgment is reversed, on the case of
Brisco v. Askey, 12 Ind. 666.*R. L. Walpole* and *R. A. Riley*, for the appellant.Tuesday,
December 3.

HAZELRIGG and Others v. WAINWRIGHT.

A judgment having been regularly entered by default, on the second day of the term, the defendant appeared on the fifth day, and moved, on affidavit, to set the default and judgment aside. The affidavit disclosed the defense of usury, and alleged that defendant had, before the first day of the term, employed counsel, upon whom he relied to make his defense, &c. *Held*, that such motions are left, in great part, to the discretion of the Court below, and that there was no abuse of such discretion in overruling the motion, the affidavit being defective in not showing that the facts were disclosed to the attorney.

APPEAL from the *Union* Common Pleas.Tuesday,
December 3.

WORDEN, J.—Suit by *Wainwright* against the appellants, upon a promissory note. On the second day of the term to which the summons was returnable, the defendants were defaulted, and judgment rendered against them. On the fifth day of the same term, *Hazelrigg* appeared and filed his affidavit, and moved thereon to set aside the default, and to obtain leave to plead. The defense sought to be set up was usury.

The affidavit sets out the facts constituting the alleged usury, but it fails to show any excuse for a failure to appear and answer upon the calling of the cause on the second day of the term, except that before the first day of the term the defendant employed counsel to defend the cause for him, and that relying on such counsel, he failed to be present when the cause was called, to put in his defense.

Nov. Term,
1861.

KIRKMAN
v.
ALLEN.

The Court overruled the motion, and in this ruling we can not say that any error was committed. In such cases, much is left to the discretion of the Courts below, and there does not appear to have been any abuse of this discretion. The affidavit is quite defective, in not showing that the counsel employed was put in possession of such information as was necessary, in order to enable him to plead the usury, or that he was advised of the nature of the defense at all. Again, it does not appear how it happened that the counsel employed neglected the defense; whether from accident, neglect merely, or from not being advised what defense to make.

Per Curiam.—The judgment is affirmed, with 3 per cent. damages and costs.

T. W. Bennett, for the appellants.

KIRKMAN v. ALLEN.

To a suit upon a promissory note, the defendant answered, as to costs, that the plaintiff was a resident of one of the *New England* States, but which one, defendant never knew; that no demand of payment was made before suit, and that defendant did not know where the money could be paid, but was always ready and willing, &c.

Held, that the answer was bad on demurrer.

Tuesday,
December 3.

APPEAL from the *Gibson* Common Pleas.

Per Curiam.—Suit by *Allen* against *Kirkman*, upon a promissory note made by the latter to the former. Judgment for the plaintiff.

The only question properly raised in the record, relates to the ruling of the Court upon a demurrer to the defendant's answer.

The answer avers, in substance, that the plaintiff is not a resident of *Indiana*, but of some one of the *New England* States; which one, however, the defendant has never known; that the defendant did not, before the commencement of

the suit, know where the note could be found, that he might pay it; that the plaintiff made no demand on the defendant, nor did he inform him where the note could be found, or the money paid; that the defendant has always been ready and willing to pay, upon demand, or upon being informed where the note could be paid. Prayer for judgment for costs.

The demurrer was correctly sustained to this answer.

The judgment below is affirmed, with 10 per cent. damages and costs.

J. J. Kirkman, for the appellant.

Hall & Donald, for the appellee.

Nov. Term,
1861.

Boggs
v.
Clifton.

BOGGS v. CLIFTON.

After the Court has commenced to instruct a jury orally, it is too late for a party to require the instructions to be given in writing.

Where the evidence is not in the record, the Supreme Court will presume in favor of the instructions of the Court below, if in a supposable state of facts, they would be correct.

APPEAL from the Warren Circuit Court.

Wednesday,
December 4.

DAVISON, J.—*Clifton* was the plaintiff below, and *Boggs* the defendant. The complaint contains two counts. The first charges, substantially, that the defendant had built a mill-dam across *Ketchapoo* creek, and constructed a mill-race, which caused the plaintiff's lands, (describing them,) to be overflowed, whereby he was damaged, &c. And the second alleges, in effect, that the defendant neglected to erect head gates, and failed to keep the embankments along the mill-race, and along the banks of the creek, in the immediate vicinity of his mill-dam, in sufficient repair; and that by reason of such neglect, the land was overflowed and damaged, &c.

Defendant answered: 1. By a general denial. 2. That one *Enoch Farmer* had been the owner of all the lands now owned by the plaintiff and defendant; and that while he was such owner, and more than twenty years before the

Nov. Term,
1861.

Booes
v.
Garrison.

commencement of this suit, he built the dam and constructed the race of which the plaintiff complains; that about three years since, the defendant bought the mill-dam and race of said *Farmer*, and now holds under him, and that they were then on the same land that they now are. It is expressly averred, that the dam and race were built and constructed more than twenty years next before the bringing of this suit; and during all that space of time, have been and have continued in the same condition, as when so built and constructed, &c.

Reply, in denial of the second paragraph of the answer. Verdict for the plaintiff. Motion for a new trial denied, and judgment, &c.

In the record, there is a bill of exceptions which says, that after the Court had commenced its charge, and before the jury had retired to consult of their verdict, the defendant requested the Court to give no other instruction, unless in writing; but the Court, over that request, instructed the jury verbally, as follows: "It has been contended, that unless the plaintiff has proved that the defendant built the dam, and dug the race, as alleged in the complaint, the jury must find for the defendant. But that is not the opinion of the Court. The true issue is, whether the defendant has kept up the race in as good repair as it has been kept in for the last twenty years."

This instruction is said to be erroneous, on two grounds: 1. It was verbally given, though the Court was requested to reduce it to writing. 2. It misdirected the jury, as to the issues made by the pleadings. The Code says: "When the argument of the cause is concluded, the Court shall give general instructions to the jury, which shall be in writing, and be numbered, and signed by the judge, if required by either party." 2 R. S., § 320, p. 110. We have recently decided that this section "should be so construed, as to require the party who desires a written charge, to notify the Court a reasonable time before it may be called to instruct the jury, of his desire that such charge be in writing." *Neer on v. Newton*, 12 Ind. 527. In this case, the request to reduce to writing was not made until after the Court had commenced its

"general instructions to the jury." And the result is, the instruction was not objectionable on the ground that it was verbally given. Nov. Term,
1861.

The second ground of objection is also untenable. Whether "the defendant had kept the mill-race in repair," &c., was one of the issues made by the pleadings; and the evidence not being in the record, we are allowed to presume that it was applicable, alone, to that issue, which thereby became "the true issue" before the jury. The instruction, as we construe it, does not assume that that was the only issue in the cause; but one involving an inquiry upon which the evidence was conflicting. For aught that appears, the other issues may have been conceded in favor of the plaintiff. *Wood v. Commons*, 3 Ind. 418.

Per Curiam.—The judgment is affirmed, with 5 per cent. damages and costs.

R. A. Chandler, for the appellant.

Gregory and Harper, for the appellee.

LINSDAY
V.
GILLESPIE.

LINSDAY v. GILLESPIE and Another.

APPEAL from the *Hamilton* Circuit Court.

Wednesday,
December 4.

Per Curiam.—Suit on a note payable at bank, against the maker and indorser. The complaint alleged presentment for payment, non-payment and notice to the indorser. No copy of the protest and notice is set out in the complaint. See *Kohler v. Montgomery, p'ss'*, p. 220. Judgment by default against the defendants, from which they appeal to this Court.

The judgment is affirmed, with 5 per cent. damages and costs.

Garrer and O'Brian, for the appellant.

F. Rand and R. Hull, for the appellees.

Nov. Term,
1861.

KOHLER v. MONTGOMERY.

KOHLER
v.
MONTGOMERY.

Suit upon a promissory note made payable in a bank, against the maker and indorser, averring due presentment, protest and notice. The note was dated *February 3, 1860*, and was payable one hundred and twenty days after date. The indorser answered by general denial. It appeared in evidence, on the trial, that the note was presented for payment, and protested for non-payment, on *June 5, 1860*.

Held, that the presentment and protest were premature by one day, as the month of *February*, commercially speaking, never has more than twenty-eight days.

Held, also, there being no allegation or proof as to whether the makers had money, or not, at the place of payment on *June 6*, that a case was not made out against the indorser.

Held, also, that if the protest and notice were not regarded as part of the complaint, then the averment of due presentment and protest was good; if they were so regarded, then the complaint did not show a legal demand and notice of non-payment, and the defect might be taken advantage of by the indorser on appeal.

Wednesday,
December 4.

APPEAL from the *Floyd* Common Pleas.

PERKINS, J.—*Lutz & Leffler* made a note, payable at a bank, to *Kohler*. The note was dated *February 3, 1860*, and was payable one hundred and twenty days after date. *Kohler* indorsed the note to the plaintiff. The complaint, which is against the maker and indorser, avers that the note was duly presented for payment, &c., but does not name the day when, &c. *Lutz & Leffler* made default. *Kohler* put in the general denial. Trial; judgment for the plaintiff.

The proof was that demand of payment, and notice of non-payment, so far as there were any, were made on *June 5, 1860*. This was premature, by one day. Commercially, *February* never has but twenty-eight days. Ind. Dig., p. 763. See Story on Bills, § 329, as to excluding the day of date in the computation of time.

There were no allegations nor proofs as to whether the makers had money at the place of payment on *June 6*, the day when payment was to be made, or not. A case, therefore, was not made out against *Kohler*, on the trial. See *Springler v. McDaniel*, 3 Ind. 275.

But it is contended that as no demurrer was put in to the

complaint, the question of the proper time of making demand of payment cannot be raised on appeal. Nov. Term,
1861.

If the protest and notice are not a part of the complaint in this case, (and it was not necessary to make them so,) the complaint does not show the day when demand was made, as it simply avers that it was duly made, and hence a demurrer would not have raised the question. If, on the other hand, the protest and notice were, in this case, made a part of the complaint, they did not cause it to show a legal demand and notice of non-payment, and this defect may be taken advantage of on appeal, by the indorser. *Blacklego v. Benedick*, 12 Ind. 389.

DART
V.
STEWART.

Per Curiam.—The judgment is reversed, with costs. Cause remanded, with leave to amend, &c.

John H. Soizenburg and T. M. Brown, for the appellant.
W. T. Otto, for the appellee.

DART and Another v. STEWART and Another.

If a conveyance be made colorably, with actual intent to defraud existing creditors, it may be avoided by subsequent creditors; in other words, evidence of collusion against existing creditors, is sufficient evidence of fraud against subsequent creditors.

APPEAL from the *Blackford* Circuit Court.

*Wednesday,
December 4.*

DAVIDSON, J.—The appellants, who were the plaintiffs, brought this action against *Wellington Stewart* and *Sarah Stewart*, his wife, alleging in their complaint these facts: In *August*, 1858, *Wellington Stewart*, with his own money, purchased of one *Lewis Bailey*, a tract of land in *Blackford* county, and received from him a deed in fee simple therefor, described as the southwest quarter of section 4, in township 23, range 10 east; also thirty acres out of the northwest quarter of the southeast quarter of the same section, township and range. After this, on *December 6*, then next following,

Nov. Term, 1861. *Stewart*, without consideration, and with intent to defraud his creditors, conveyed the lands described to one *Leonard Close*, who was then notoriously insolvent, and afterward, on the same day, *Close*, without any consideration whatever, conveyed the same lands to *Sarah Stewart*, the wife of *Wellington Stewart*; she, the said *Sarah*, thus knowingly and fraudulently assisting her husband to defraud his then creditors, and those to whom he might thereafter become indebted.

DART
v.
STEWART.

Stewart, when he conveyed to *Close*, was largely indebted, and was not worth half the value of the land, which was then estimated at \$4,000. And afterward, on *October* 24, 1856, being engaged in the mercantile business, he represented to the plaintiffs that he was the owner of the above described land, and that it was worth \$30 per acre. By means of these representations, the plaintiffs were induced to sell him store goods of the value of \$2,000, for which he gave them his promissory notes, and out of the proceeds of the sale of the goods thus purchased, he paid at least one half of the purchase money of the land. It is averred that upon the notes given for the goods, the plaintiffs, at the *October* term, 1857, recovered a judgment in the *B'ac'ford* Circuit Court against *Stewart*, for \$1,000, and that an execution, issued upon said judgment has been returned "*nulla bona*."

The relief prayed is, that the deeds to *Close*, and from him to *Sarah Stewart*, be annulled, &c., and that the land be sold for the payment of the judgment, &c. Demurrer to the complaint sustained, and final judgment for the defendant.

The only question to settle in the case is, do the facts stated in the complaint constitute a sufficient cause of action? As we understand them, *Stewart*, while legally indebted, conveyed the land in question to *Leonard Close*, who conveyed it to *Stewart's* wife. These conveyances were executed on the same day, were made without consideration, with intent "to defraud his then creditors, and those to whom he might thereafter become indebted." The rule applicable to cases of this sort, may be thus stated: "If a conveyance be made colorably, with actual intent to defraud existing creditors, it may be avoided by subsequent

creditors; in other words, evidence of collusion against existing creditors, is sufficient evidence of fraud against subsequent creditors. 1 Am. Lead. Cases, p. 71, and authorities there cited; 1 Story's Eq. Jur., § 361; *Pennington v. Clifton*, 11 Ind. 162; *Ruffing v. Tilton*, 12 Ind. 259. This exposition is no doubt correct, and being so, it will at once be seen that the plaintiffs, upon the case made, are entitled to recover, because the complaint charges an actual intent to defraud both existing and subsequent creditors. In our opinion, the demurrer was not well taken.

Per Curiam.—The judgment is reversed, with costs. Cause remanded, &c.

A. J. Neff, and *W. March*, for the appellants.

Nov. Term,
1861.

ANDERSON
v.
WEAVER.

ANDERSON and Another v. WEAVER.

One defendant can not be examined as a witness for another, where the matter proposed as evidence tends to defeat the action as to all the defendants.

Where a cause is submitted to the Court for trial, there being an issue of law upon demurrer undisposed of, it will be presumed that the issue was decided in the general finding; but it is error to proceed to the trial of issues of fact before a jury, when issues of law remain undisposed of.

APPEAL from the *Wayne* Common Pleas.

Wednesday,
December 4.

DAVISON, J.—*Weaver*, who was the plaintiff, sued *Anderson* and *Storms* upon a delivery bond, which bears date *February* 9, 1856, in the penalty of \$100, was executed to one *Lydia Wolf*, and is conditioned thus: "If the said *Anderson* shall deliver to the sheriff of *Wayne* county, on *March* 21, 1856, or at any time when called for, within three months from that date, at *Hagerstown*, in said county, one bay mare, levied on as the property of *Anderson*, by virtue of an execution in favor of said *Lydia Wolf*, then this obligation shall be void," &c. The bond was afterward, and before the commencement of this suit, duly assigned by the obligee to the plaintiff. And for breach of said condition, it is alleged that *Anderson*

Nov. Term, 1861. failed to deliver said mare to the sheriff, in accordance with the terms and effect of the contract, or otherwise, &c.

Anderson

v.

Wheeler.

Defendant's answer contains eight paragraphs; to all of which the plaintiff replied. But to the reply to the second and third paragraphs of the answer, the defendants demurred. The issues were submitted to a jury. Verdict for the plaintiff; upon which the Court having refused a new trial, rendered judgment.

The motion for a new trial points out two grounds upon which the appellants rely for a reversal of this judgment. 1. Error of the Court in refusing to admit testimony offered by the defendants. 2. A demurrer to the reply to the second and third paragraphs of the answer, was pending and undisposed of, when the cause was tried.

During the trial, *Storms* proposed to prove by *Anderson*, his co-defendant, that the mare described in the condition of the bond was, at all times after it was executed, until the end of four months thereafter, ready for delivery to the sheriff, at the place therein designated; but was not called for or demanded. This evidence was, upon the plaintiff's objection, refused, and the defendants excepted. There is nothing in the exception. One co-defendant can not be examined as a witness for another, when the matter proposed as evidence tends to defeat the action as to all the defendants. *King v. The State*, 15 Ind. 64; *Perrin v. Johnson*, 16 Ind. 72. These authorities are decisive of the point under discussion, because, if the mare was ready to be delivered within the time and at the place designated in the condition of the bond, and was not demanded, the action was not maintainable against the defendants, or either of them. It follows, the evidence was correctly refused.

But the Court proceeded to final trial without deciding the issue raised by the demurrer. This, it seems to us, was an irregularity, on account of which the proceedings must be held defective. It is true, where the cause is submitted to the Court for trial, there being an issue of law upon demurrer undisposed of, it will be presumed that that issue was decided in the general finding *Hosier v. Eason*, 14 Ind. 523. But this rule is not applicable where the issues

of fact are submitted to a jury. *Gray v. Cooper*, 5 Ind. 506. Nov. Term, 1861.
 In that case it was expressly decided, that "it was error to proceed to the trial of issues of fact before the jury, when issues of law remained standing, and not disposed of." SHATTELL
 V.
 WOODWARD.
Stephen's Pl. 43, 44; *Green v. Dulany*, 2 Munt. 518.

Per Curiam.—The judgment is reversed, with costs.
 Cause remanded, &c.

J. B. Julian, for the appellants. .

O. P. Morton, *J. F. Kibbey*, and *N. J. Johnson*, for the appellee.

SHATTELL v. WOODWARD.

A mechanic's lien can be enforced, under our statute, for work done and materials furnished in the erection of a school-house, built by order and contract of a township trustee.

APPEAL from the Warren Common Pleas.

Wednesday,
 December 4.

Per Curiam.—The only question in this case, is whether a mechanic's lien can be enforced, under our statute, for work done and materials furnished in the erection of a school-house, built by order and contract of a township trustee, for the purpose of common schools.

The statute appears to be so general as to include such houses, and we think, *prima facie*, does. If any facts exist that should prevent the operation of the statute in a given case, they should be shown in defense.

The judgment is reversed, with costs. Cause remanded, &c.

Gregory & Harper, for the appellant.

J. W. Brown, *J. Park*, and *Levi Miller*, for the appellee.

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1861.

BURRISS v. TAGUE.

OVERTON.
v.

OVERTON.

APPEAL from the *Boone* Common Pleas.

Per Curiam.—Suit by *Tague* against the appellant.
Judgment for the plaintiff.

Wednesday,
December 4.

There is no exception in the record, except that taken to the overruling of a motion for a new trial.

It does not appear that any written reasons for a new trial were filed; none are contained in the record.

The judgment is affirmed, with 5 per cent. damages and costs.

O. S. Hamilton, for the appellant.

A. J. Boone, for the appellee.

OVERTON v. OVERTON.

In a suit before a justice of the peace, the plaintiff claimed forty dollars, but recovered only seven dollars. The defendant appealed to the Court of Common Pleas, where the plaintiff had judgment for four dollars and fifty cents, from which the defendant appealed to the Supreme Court.

Held, that the judgment below must be regarded as the "amount in controversy," on appeal, and that being less than ten dollars, the Supreme Court has no jurisdiction.

Wednesday,
December 4.

APPEAL from the *Morgan* Common Pleas.

DAVISON, J.—The appellee, who was the plaintiff, sued *William Overton* before a justice of the peace. The complaint charges, substantially, that the defendant was indebted to the plaintiff thirty-eight dollars, for four trees, for which he refuses payment. The damages were laid at forty dollars. Before the justice, the plaintiff obtained judgment for seven dollars and fifty cents, and the defendant appealed. In the Common Pleas, to which the cause was taken by appeal, the issues were submitted to the Court, who found for the plaintiff, four dollars and fifty cents; upon which, over a motion for a new trial, there was judgment, &c. The defendant appeals to this Court. Has the Supreme Court jurisdiction? The statutory

rule is, that "Appeals may be taken from the Common Pleas and Circuit Courts to the Supreme Court, by either party, from all final judgments, except in actions originating before a justice of the peace, or mayor of a city, where the amount in controversy, exclusive of interest and cost, does not exceed ten dollars." 2 R. S., § 550, p. 158. It may be noted that, in this case, "the defendant claims the allowance of no set-off, rejected by the lower Court, and that the plaintiff, though in his complaint he claims more than ten dollars, is content with the amount which he has recovered. This leaves the sum in controversy in this Court, four dollars and fifty cents, and no more; because it is only from the payment of that amount relief is sought. And that being the amount in contention before us, we are not allowed to assume jurisdiction. This result accords precisely with various adjudications under a statutory provision similar to the one to which we have referred. *Tripp v. Elliott*, 5 Blackf. 168; *Reed v. Sering*, 7 *id.* 135; *Bogart v. The City of New Albany*, 1 Ind. 38. As this Court has no jurisdiction of the appeal, the assignments of error will not be noticed.

Per Curiam.—The appeal is dismissed, with costs.

A. A. Barriokman, for the appellant.

W. R. Harrison, for the appellee.

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1861.

MILLISON

v.
HOCH.

MILLISON v. HOCH.

Suit to recover for deceit in the sale of a yoke of cattle. The complaint averred, that "the defendant well knowing the premises, and intending to cheat and defraud the plaintiff, falsely and fraudulently represented to him, that the cattle were gentle," &c. The Court instructed the jury, that if they found the defendant had been guilty of a fraud upon the plaintiff, they might assess exemplary, or smart damages, in addition to compensatory, or actual damages.

Held, that the instruction was correct; the rule being, that where the offense is not punished by the criminal law of the land, and where the elements

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of fraud, malice, gross negligence, or oppression, mingle in the controversy, the jury may give vindictive or exemplary damages.

MILLISON
v.
HOCH.

APPEAL from the *Pulaski* Common Pleas.

Wednesday,
December 4.

WORDEN, J.—Suit by *Hoch*, against *Millison*. There were two counts in the complaint; one alleging a breach of warranty in the sale of a yoke of oxen; the other alleging false and fraudulent representations made by the defendant to the plaintiff, in reference to the oxen

Issue; trial by jury; verdict and judgment for the plaintiff

A new trial was asked, on the ground of excessive damages; that the verdict was not sustained by the evidence; and for error of law occurring at the trial, in this, to wit: "the Court erred in instructing the jury as follows: 'If the jury find from the evidence, that in the sale of the cattle, by *Millison* to *Hoch*, the defendant was guilty of a fraud upon *Hoch*, the jury may assess exemplary, or smart damages, in addition to compensatory, or actual damages proved.'"

The instruction, thus given, was applicable to the second count in the complaint, which alleged, that at the time of the sale of the cattle, "the defendant, well knowing the premises, and intending to cheat and defraud the plaintiff, in said sale, falsely and fraudulently affirmed, and represented to him, that the cattle were gentle," &c., (here follow the representations, which are averred to have been false;) "all of which," it is averred, "was well known to the defendant at the time he made said representations."

The instruction given, we think, is sustained by the case of *Taber v. Hutson*, 5 Ind. 322. The rule was there recognized, that where the offense is not punished by the criminal law of the land, and "whenever the elements of fraud, malice, gross negligence or oppression, mingle in the controversy, the law, instead of adhering to the system, or even the language of compensation, adopts a wholly different rule. It permits the jury to give what it terms punitive, vindictive, or exemplary damages."

There is another instruction discussed in the brief of counsel for the appellant, but as it was not brought to the

attention of the Court below, in the motion for a new trial, we shall not notice it. The language of the reasons for a new trial, excludes the idea that any instruction was complained of, except the one there set out.

We cannot reverse the judgment on the evidence, as that tends to support the verdict.

Per Curiam.—The judgment is affirmed, with 1 per cent. damages and costs.

D. D. Pratt and D. P. Baldwin, for the appellant.

D. D. Dykernan, for the appellee.

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1861.

SHEPHERD

v.

FISHER.

SHEPHERD and Others v. FISHER and Others.

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An administrator *de bonis non* filed with the clerk of the proper Court, in vacation, his petition for the sale of real estate of the deceased. Notice to the heirs was issued by the clerk, and at the next term of the Court a sale was ordered, in accordance with the petition. The land was sold, the purchase money paid, and a deed executed to the purchaser by order of Court. Proceedings by the heirs of the intestate to review the order directing a conveyance to be made.

Held, that under the R. S. 1843, the petition of the administrator was properly filed in vacation, and that the clerk had authority to issue notice to the heirs without any special order of the Court.

Held, also, that the heirs of the intestate stand in the same position as if the sale had been made by them, and can not set aside the sale on the ground of fraud, or of a trust, without having first restored the purchase money.

A person entitled to rescind a contract on the ground of fraud, must restore to the other party what has been received, so as to place him in *statu quo*.

APPEAL from the *Vanderburg* Common Pleas.

Wednesday,
December 4.

WORDEN, J.—*Hiram W. Cloud* died, leaving certain real estate. Letters of administration *de bonis non* having been granted to *James T. Walker*, he petitioned the proper Court for an order to sell the land for the payment of the debts of the deceased, which was granted, and the land sold to *John T. Fisher*, one of the appellees, who paid the purchase money, and, by order of the Court, received a conveyance therefor.

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1861.

SHEPHERD
v.
FISHER.

This complaint was filed by the heirs of *Cloud*, deceased, for a review of the order directing a conveyance to be made to *Fisher*, and asking that the sale be set aside on the ground of fraud, &c. Demurrer to the complaint sustained. The plaintiffs appeal.

The proceedings on the application for an order to sell the land seem to have been entirely regular. The only objection made in this respect is, that the petition was filed in the vacation of the Court, notice to the heirs issued by the clerk, and the sale ordered at the next term. It is claimed, that "the petition should have been presented to the Court while in session, and notice given to the heirs by the order of the Court; that as it was given by the clerk, it was a mere nullity." We do not concur in this view. The statute under which the proceedings were had, (R. S. 1843, p. 527,) to be sure, required that the petition should be presented to the Court, and the Court could only make the order while in session, all of which was done here; but it is further provided by the same statute, (§ 223,) that "No order for such sale of real estate shall be made, until notice of the petition, and of the time and place of hearing the same, *shall have been given* to the heirs," &c.

We think, under these provisions, the petition was properly filed in vacation, and notice properly issued by the clerk, without any special order of the Court; and that notice having been served in time, the order was properly made at the next term of the Court.

The substance of the ground on which the sale to *Fisher* is sought to be set aside is, that he made the purchase for the benefit of the heirs of the deceased, and so proclaimed to the persons attending the sale, and who would have bid thereon but for such statements; and, also, that he made false and fraudulent representations in respect to the portion which had been assigned to the widow as her dower in the premises, by which persons were dissuaded from purchasing, and competition prevented. *Vide*, on this subject, *Arnold v. Cord*, 16 Ind. 177. The complaint, however, is radically defective, in not showing that the plaintiffs have placed themselves in a position to take advantage of the alleged

fraud, or to enforce the alleged trust. A person entitled to rescind a contract, on the ground of fraud, must restore to the other party what has been received, so as to place him in *status quo*.

This sale, to be sure, was made by the administrator, and not by the plaintiffs, but that can make no difference in principle. The land was liable for the debts of the deceased, and was sold for the payment of those debts. The plaintiffs stand in the same situation as if the sale had been made by them; and before they can set aside the sale to *Fisher*, they must restore to him the purchase money thus paid. The same may be said in reference to the trust, arising from the alleged fact that *Fisher* purchased the land for the benefit of the plaintiffs. Before such trust can be enforced, the money invested by *Fisher* must be paid and restored to him.

The complaint does not allege that the plaintiffs have offered to rescind the contract, or to restore the purchase money thus invested by *Fisher*; and as it is defective in this respect, we have not examined whether, had this been done, the other facts charged would have entitled the plaintiffs to a rescission, or other relief.

Per Curiam.—The judgment below is affirmed, with costs.

A. L. Robinson, for the appellants.

J. G. Jones and J. E. Blythe, for the appellees.

SEVERSON and Another v. MOORE.

Suit to foreclose a mortgage by an assignee holding two, of three, mortgage notes. The defendant answered, that the assignee of the second note, being a person other than the plaintiff, had sued and obtained judgment for the amount, and for foreclosure, &c.; no record of the judgment was filed with, or made a part of, the answer.

Held, that the answer was bad, and that a demurrer thereto was correctly sustained.

APPEAL from the *Tipppecanoe* Common Pleas.

HANNA, J.—Suit on notes, and to foreclose a mortgage.

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SEVERSON
v.
MOORE.

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PRATT
v.
BOYD.

Answer: denial; payment; set-off; and former recovery on the same mortgage. Reply: denying the payment, and admitting the set-off. Demurrer to the fourth paragraph of the answer sustained; which presents the only point made. It appears that the mortgage was given to secure three notes, of even date, but payable at different days; they were all assigned, the second to a person other than the plaintiff, who sued and, it is alleged, had judgment for the amount and for foreclosure. The answer relies on this proceeding as a merger of the mortgage contract in said judgment. To have enabled us to have passed upon that point, the record of the judgment should have been filed with, or made a part of, the answer. It was not done, and, consequently, the demurrer thereto was correctly sustained.

The appellee confesses that an error occurred in taking a personal judgment against the wife, who signed the mortgage, but not the notes.

Per Curiam.—For the error confessed, so much of the judgment is reversed; but the balance is affirmed, at the costs of the appellee.

George Gardner, for the appellants.

W. C. Wilson, for the appellee.

PRATT v. BOYD.

Suit to recover the value of a certain promissory note, converted by the defendant to his own use. The Court instructed the jury that if the maker of the note was insolvent, so that he had no property subject to execution, his note was of no value, and the defendant was not liable for its conversion.

Held, that the instruction was erroneous, as other elements than mere amount of property subject to execution, enter into a man's credit, and the value of his paper.

Wednesday,
December 4.

APPEAL from the *Parke* Circuit Court.

PERKINS, J.—*James W. Pratt* held a note on *Levi Lewis* for \$100. He placed the note in the hands of *Jos p^t Boyd*

with instructions to obtain, in exchange for it, the note of *Henderson* and *Sier*, pursuant to a previous arrangement among the parties. Instead of exchanging the note according to instructions, *Boyd* appropriated it in part payment of a horse, counting its value at about \$80. *Boyd* offered the horse to *P'ratt*, at his (*Boyd's*) bargain, but *P'ratt* refused to accept it, and sued *Boyd* for the converted note. It was proved that *Lewis*, the maker of the converted note, had no property subject to execution; but there was no other evidence touching the value of his note, except the fact that *Boyd* sold it for about \$80. The Court instructed the jury, in substance, that if *Lewis* was insolvent, so that he had no property subject to execution, at a given date, his note was of no value, and *Boyd* was not liable for its conversion; although he sold it for \$80, and at a different date, perhaps, from that fixed in the instruction, and when *Lewis* was not insolvent. The jury found for the defendant, *Boyd*.

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P'ratt
v.
Boyd.

The instruction was wrong, and so was the verdict. The fact that a man is insolvent at one period, is not conclusive evidence that he will always remain so. Nor is that fact conclusive proof that his note is worthless. Take the case of an honest, industrious young man of twenty-one years of age, who is without a dollar's worth of property, but who by his industry is able, and by his honesty is willing, to pay notes he may execute. Is his note worth nothing? Take the man of family, without property, but with a business talent and education which enable him to earn five dollars a day, and with honesty that leads him to fulfill his promise. Is his note for a hundred dollars worth nothing? Other elements than mere amount of property subject to execution, enter into a man's credit, and the value of his paper.

Per Curiam.—The judgment is reversed, with costs. Cause remanded. &c.

S. F. & D. H. Maxwe'l, for the appellant.

Crain and *Allen*, for the appellee.

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1861.

GALBRETH v. GASKIN.

GRIFFIN

APPEAL from the *Grant* Common Pleas.

v.
TEMPLETON.

Wednesday,
December 4.

Per Curiam.—The trial of this cause was had at the February term, 1860, of the Court below. Sixty days were given, in which to file bills of exceptions. They were not filed within the sixty days, inclusive. The judge had no power to file them after the expiration of the sixty days; and, hence, they are no part of the record.

The judgment is affirmed, with 1 per cent. damages and costs.

A. Steele, H. D. Thompson and J. Brownlee, for the appellant.

Isaac Van Devanter and J. F. McDowell, for the appellee.

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GRIFFIN v. TEMPLETON.

Where the deposition of a witness residing in a county adjoining to that in which a cause is pending, has been taken by agreement of the parties, it may be read in evidence on the trial, without showing any reason for the non-production of the witness.

The Supreme Court will presume in favor of the instructions of the Court below, where the evidence is not in the record, if in a supposable state of facts under the issues, they would have been correct.

Wednesday,
December 4.

APPEAL from the *Benton* Circuit Court.

HANNA, J.—Suit on note. Answer: 1. That the note was given for land, and that, as to a part of the same, there was a failure of consideration, in this, that the vendor had no title, &c. 2. Denial. 3. Partial failure of consideration, in this, that two acres were reserved for a grave yard, worth, &c., that plaintiff removed a fence, worth, &c.; that plaintiff represented that a certain fence, worth, &c. was on and belonged to said premises, when in fact it did not, and has been removed by the owner, &c.

Reply: 1. Denial. 2. Defendant accepted a deed with a reservation of said burial ground, &c. in full discharge of said contract, &c. of sale.

Trial; verdict and judgment for plaintiff, for \$2,432.58. Nov. Term,

The errors assigned relate to the rulings on the admission of evidence, and to the instructions. 1861.

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v.
TEMPLETON.

The record shows that the deposition of a resident of a county adjoining *Benton*, taken by agreement of parties, was offered by the plaintiff, and, over the objection of the defendant, read in evidence. The ground of objection was, that the witness should have been produced. The statute is, that depositions may be taken, &c. and used on the trial in any action "in the following cases."

"*First*. Where the witness does not reside in the county, or in a county adjoining the one in which the trial is to be held," &c.

"*Second*. When the deponent is aged," &c.

"*Third*. When the depositions have been taken by the agreement of parties," &c.

"*Fourth*. When the deponent is a state or county officer," &c.

"In either of the foregoing cases, the attendance of the witnesses can not be enforced." 2 R. S., § 250, p. 86.

It is insisted that this case falls within the first subdivision, above set forth, and that the attendance of the witness should have been enforced.

We are of opinion that this deposition falls within the third sub-division, and that the attendance of the witness could not be enforced; consequently, the party offering to read said deposition could not be required to first show any reason for the non-production of the witness in person. This view is strengthened by a subsequent section, as follows: "No deposition shall be read in evidence on the trial of a cause, if at the time the witness himself is produced in Court, unless the deposition has been taken by the agreement of the parties, or by the order of the Court." § 252.

As we construe this section, either party might have insisted upon this deposition being read, rather than that the witness should be examined, although he might have been in Court during the trial.

As to the ruling on instructions, the Court refused an instruction as asked, but gave it with a modification. The

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SOWLE
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HOLDRIDGE.

evidence is not in the record, and as the charge is not in such form as to be erroneous, under a state of facts which might have been proved, within the issues, we can not pronounce it bad.

Per Curiam.—The judgment is affirmed, with 2 per cent. damages and costs.

D. Mace, J. S. Miller, D. P. Vinton, and J. Benedict, for the appellant.

H. W. Chase and J. A. Wilsch, for the appellee.

SOWLE v. HOLDRIDGE.

- A.* purchased a tract of land for \$400, and received a bond for a deed. Before he had made payment of the purchase money, he assigned the bond to *B.*, who paid the purchase money, and received a deed. Afterward, a controversy having arisen, as to whether the assignment of the bond was absolute, or in trust, *A.* and *B.* entered into a written agreement, *October 19, 1858*, by which *B.* agreed to convey the land to *A.* for the price of \$900; which was to be paid, in part, at the time of making the deed, and the residue in three yearly installments, to be secured by a mortgage on the premises. This agreement was to be executed, *November 3, 1858*, by the delivery of a deed, on the one hand, and the mortgage and notes, together with the cash payment, on the other. In 1859, *B.* instituted a suit to recover the possession of the land, averring a tender of the deed.
- Held*, that under the general denial, every legal and equitable defense, going to the merits of the case, could be given in evidence.
- Held*, also, that after pleading the general denial, the defendant can not plead in abatement; and when a cause is on trial on the merits, matter in abatement is inadmissible in evidence.
- Held*, also, that as the agreement of *October 19* was fairly executed, upon a compromise of the former controversy, the parties were estopped to go behind it, and reopen that controversy.
- Held*, also, that as *A.* failed to show any offer or effort, on his part, to comply with the agreement mentioned, he established no legal or equitable defense to the action.

Wednesday,
December 4.

APPEAL from the *Seaborn* Circuit Court.

PERKINS, J.—In 1844, *Dudley Holdridge* purchased of *Sumner and Clark*, a parcel of ground. He agreed to pay for it, in installments, \$400; and was to receive a deed when

full payment was made. A title bond evidenced the agreement. *Holdridge* found himself unable to pay the latter installments of purchase money, and he assigned his title bond to *Francis Sowle*, who made the payments, and received a deed for the land from *Sumner* and *Clark*. The assignment of the bond was absolute, and not accompanied by any trust, unless one was created by parol. A controversy afterward arose between *Sowle* and *Holdridge*, as to the relation between them, touching this land; *Holdridge* contending that *Sowle* was holding it as a trustee for him; *Sowle* denying the trust relation. They subsequently entered into an agreement, as follows:

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SOWLE
v.
HOLDRIDGE.

"Agreement made this 19th of *October*, 1858, between *Francis Sowle* and *Dudley Holdridge*, as follows, viz., *Sowle* agrees to convey the southeast quarter of section 28, township 37 north, range 14 east, in *Steuben* county, *Indiana*, (the land conveyed to *Sowle* under the title bond mentioned,) to *Dudley Holdridge*, for the consideration of \$900, making a good and sufficient deed therefor; and said *Holdridge* agrees to pay therefor the sum of \$900, as follows, viz., said *Holdridge* is to obtain and pay down to *Sowle*, the amount tendered and paid into Court, in the case of *Sowle v. Holdridge*, now pending in the *St. Joseph* Circuit Court, *Indiana*, and the balance in payments: one third one year from this date; one third two years from this date; the balance three years from this date, with use, and waiving valuation laws of *Indiana*; and to execute a mortgage on the west half of said quarter section, to secure the payment of the same, and the performance of the stipulations herein. And it is agreed that the parties shall pay their witness fees, respectively; and the balance of the costs accrued, each to pay one half, in the suit aforesaid. *Holdridge* is to pay tax of 1858, on the land. The performance of the above stipulations, respectively, to be done on the 3d of *November* next; and for the performance, the parties bind themselves in the sum of \$1,000.

"Witness our hands and seals the day and year first above written.

"FRANCIS SOWLE. [SEAL.]
"DUDLEY HOLDRIDGE. [SEAL.]"

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In 1859, *Sowle* commenced this suit, for the recovery of the possession of the land in question. *Holdridge* answered, by way of general denial; under which answer every legal and equitable defense, going to the merits of the case, could be given in evidence. Acts of 1855, p. 57. After putting in the general denial, he could not answer in abatement. 14 Ind. 89; 1 Tidd. 637-639. He did not, by way of counter claim, as authorized by the code, (2 R. S., p. 349) seek a specific performance of the contract above set out, showing, in such answer, performance of the conditions, or an offer to perform, on his part.

On the trial, the plaintiff, *Sowle*, proved the legal title to be in himself; proved that the agreement copied into this opinion was executed by the parties, upon a compromise and settlement of their differences in the premises, and that he had tendered a deed, pursuant to its terms. The defendant, *Holdridge*, did not attempt to disprove the agreement, nor that it was executed upon a compromise; nor did he pretend that there was any fraud connected with its execution; nor that he had attempted, or intended to attempt, to comply with its terms, on his part.

As the agreement was fairly entered into, upon a compromise, the parties were estopped to go behind it and reopen the original controversy; and as the case was on trial upon the merits, matter in abatement was inadmissible as evidence for the consideration of the Court or jury. And as the defendant, *Holdridge*, failed to show, or then to make, any effort or offer to comply with the agreement mentioned, he established no legal or equitable defense to the action.

Per Curiam.—The judgment is reversed, with costs. Cause remanded for further proceedings, with leave to amend, &c.

J. B. Howe, for the appellant.

D. E. Palmer, for the appellee.

DICK v. NILES.

Max. Term,
1861.

BROWN
v.
SHEARON.

Wednesday,
December 4.

APPEAL from the *Clinton* Common Pleas.

Per Curiam.—Suit by *Niles* against *Dick*, for work and labor done under a special contract, and for goods, &c.

Trial by the Court; finding and judgment for the plaintiff.

A demurrer was sustained to the complaint, because it claimed over one thousand dollars. This was before the act of 1859, extending the jurisdiction of the Court of Common Pleas. The plaintiff asked and obtained leave to amend his complaint, which was granted on payment of costs and the continuance of the cause. The defendant excepted to the order of the Court granting leave to amend the complaint. There was no error in this respect. *Epperly v. Little*, 6 Ind. 344.

The only other question is, whether the evidence sustains the finding. We think it has a tendency to do so, and can not reverse the judgment.

The judgment is affirmed, with costs.

N. Pu dum, for the appellant.

McCung and *Sims*, for the appellee.

BROWN v. SHEARON.

An amended paragraph was filed to an answer while the jury was being empaneled, and was not brought to the attention of the opposite party until the evidence had been heard. The plaintiff, by leave of the Court, then filed a reply to the answer, the jury were re-sworn, and the evidence again heard.

Held, that there was no error in permitting the filing of the reply.

In an affidavit for the continuance of a cause, on account of the absence of a witness, the defendant attempted to excuse his want of diligence, by showing that the note sued on was given for a balance found by the witness, as an accountant, to be due the plaintiff on the dissolution of a

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BROWN
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SHEARSON:

co-partnership, and that a mistake occurred in such accounting, which the witness could not ascertain without an examination of the books, and that he had not had time to do so, &c.

Held, that the affidavit did not show a valid excuse for the failure to procure the attendance of the witness.

In a proceeding for the foreclosure of a mortgage, the original mortgage was filed with the complaint, but was not given in evidence to the jury. After a verdict for the plaintiff, the Court entered a decree of foreclosure, &c.

Held, that after the jury had found the amount due to the plaintiff upon the mortgage, it was the duty of the Court, if the evidence warranted it, and the party desired it, to order the foreclosure, and for that purpose the mortgage was before the Court.

Thursday,
December, 5.

APPEAL from the *Wayne* Circuit Court.

HANNA, J.—Suit on a note, and to foreclose a mortgage. An answer was filed consisting of seven paragraphs; to the fourth of which, a demurrer was sustained, and leave taken to amend the same. The amendment was not filed until the jury was being empaneled, and was not brought to the attention of the Court and opposite party until the evidence had been heard; it was then insisted that the trial had been had without an issue as to that paragraph. The record of the clerk states, that, on leave, a replication was then filed; a bill of exceptions shows, in connection with other parts of the record, that it was a denial. The pleading copied in the record by the clerk as a reply to said fourth paragraph, is a demurrer.

It is now urged, that there was, as to the said fourth paragraph, a trial without an issue of fact, and while an issue of law was pending thereon; and if not, that it was error to permit the plaintiff to file the reply at the time it was filed.

We think it sufficiently appears that a reply in denial was filed, and that it was not an issue of law tendered. We see no error in the Court permitting said filing at the time. The jury were re-sworn, and the evidence again heard.

If permitting the completion of the issue, and causing the trial to then proceed upon it, would injure the defendant, he should have, in a proper manner, brought that fact to the attention of the Court.

Before trial, a motion was made for a continuance to

procure the attendance of one *Dennis* as a witness. It is not shown that any diligence had been used to procure his attendance. This apparent neglect is attempted to be excused in consequence of the circumstances of the case. The note was alleged, in the answer, to have been executed to secure the amount found due by said *Dennis*, as an accountant, from one party to the other, upon the dissolution of a partnership; and that a mistake occurred in said accounting and settlement, which is pleaded, &c. It is stated in the affidavit, that the witness would have to examine the books and accounts, before he could testify as to such mistake, and that he had not had time to do so, &c.

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We do not think this is a valid excuse for the failure to procure his attendance. Upon the alleged item of mistake being brought to his notice, he might have been prepared to testify; if not, he could, under the direction of the Court, have made an examination. Perhaps, if he could not testify without such examination, the party desiring his evidence could not in any other way compel the same, and thus be prepared to avail himself of the evidence.

There was a judgment for the amount of the note, and for a foreclosure of the mortgage. The record purports, in a bill of exceptions, to contain the evidence. The mortgage is not in the bill, as a part of said evidence. The original mortgage, it is averred, was filed with, and as a part of, the complaint.

It is now insisted, that the decree of foreclosure is erroneous because the jury did not find upon that point, and because the mortgage does not expressly appear to have been given in evidence.

The jury found the amount due; and upon that, it was the duty of the Court, if the evidence warranted it, and the party desired it, to order the foreclosure. We are of opinion, that for that purpose, the mortgage was before the Court in a form that authorized its consideration.

Per Curiam.—The judgment is affirmed, with 3 per cent. damages and costs.

W. A. Bickle and *C. H. Burchenal*, for the appellants.

H. B. Payne, for the appellee.

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LEATHERS v. HOGAN and Another.

LEATHERS
v.
HOGAN.

Suit commenced before a justice, after the act of 1861 (Acts 1861, p. 141) went into force. The damages claimed were two hundred dollars. On appeal to the Common Pleas, the cause was dismissed for want of jurisdiction in the justice.

Held, that the dismissal was error, and that the justice had jurisdiction of the cause.

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APPEAL from the *Hendricks* Common Pleas.

PERKINS, J.—Suit before a justice of the peace for an injury to property, in which the damages claimed were two hundred dollars. It was not a suit in which the title to lands came in question. It was dismissed below for want of jurisdiction. It was commenced after the Acts of 1861 came into force. The dismissal was error. An act passed March 11, 1861, declares that “justices of the peace shall have jurisdiction to try and determine suits founded on contract or tort, where the debt or damage claimed, or the value of the property sought to be recovered, does not exceed one hundred dollars, and concurrent jurisdiction to the amount of two hundred dollars, but the defendant may confess judgment for any sum not exceeding three hundred dollars. No justice shall have jurisdiction in any action of slander, for malicious prosecution, or breach of marriage contract, nor in any action wherein the title to lands shall come in question, or the justice be related by blood or marriage to either party.” Acts 1861, p. 141.

Jurisdiction as to subject matter, is power to hear and determine a cause. Concurrent jurisdiction is that which is possessed concurrently with another court, over a given subject matter; and where original jurisdiction is given to two courts, over a given subject matter, the jurisdiction is concurrent without its being expressly said so; and neither of the courts possesses the jurisdiction any the less because the word concurrent may be used in conferring jurisdiction.

The section of the statute above quoted, then, means the same as though it read thus, on the point of jurisdiction: Justices of the peace shall have original jurisdiction in actions of contract and tort, to the amount of one hundred

dollars. Justices of the peace shall have original jurisdiction in such actions to the amount of two hundred dollars. Justices of the peace shall have jurisdiction to enter judgments by confession to the amount of three hundred dollars.

The first clause in the section, giving jurisdiction to the extent of one hundred dollars, is surplusage, because the greater jurisdiction conferred by the second clause includes the less; but surplusage, though it may produce obscurity and confusion, does not, of itself, absolutely vitiate. It may, it is true, in some cases, produce so great a degree of uncertainty as to render an act void for that cause. This is not such a case.

Per Curiam.—The judgment is reversed, with costs. Cause remanded for trial.

Geo. K. Carter and W. W. Leathers, for the appellant.

C. C. Nave and J. Witherow, for the appellee.

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GILLESPIE
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AND
SOUTHERN
RAILROAD CO

GILLESPIE v. THE FORT WAYNE AND SOUTHERN RAILROAD COMPANY.

Suit upon a promissory note. Answer: that the note was given for certain shares of the capital stock of The Fort Wayne and Southern Railroad Company, and that at the time of giving the same the said corporation had no legal existence, in this: that said company was authorized by an act of the Legislature, in 1849, but did not act upon or accept said charter until November 19, 1852, before which time the new Constitution had gone into force, prohibiting the creation of corporations, other than banking, by special act.

Held, that the organization of the company was a naked assumption, without authority of law, or semblance of right.

Held, also, that a promise to a body or organization of men, professing to act as a corporation, in an instance, or under circumstances, where by law a corporation of that character could not have a legal existence, does not estop the person making it from showing the facts.

APPEAL from the *Grant* Circuit Court.

HANNA, J.—Suit on a note. Answer: among other things,

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that the note was given to the company for shares of the capital stock of the same; that at the time of said promise said corporation had no legal existence, in this: that by act of the Legislature, in 1849, such corporation was authorized, but that said charter was not accepted, nor acted upon, nor was the company organized, until *November 19, 1852*. At that time no power or authority existed in the persons who attempted so to organize, to act under said charter; because the same had become inoperative, in consequence of the adoption of the new Constitution, on *November 1, 1851*; § 13 of the 11th article of which is, that "corporations, other than banking, shall not be created by special act, but may be formed under general laws." And by the schedule ordinance, "All laws now in force, and not inconsistent with this Constitution, shall remain in force until they shall expire or be repealed." The charter not having been accepted, nor in any manner acted upon, it can not be pretended that any vested rights had accrued under it. Under these circumstances, any franchises that the sovereign power may have intended to vest in the company, if they did not still remain in, certainly reverted to, the sovereign, upon the adoption of said Constitution. The organization, then, as stated in the answer, and admitted by the demurrer, was a naked assumption, without authority of law, or semblance of right, and any contract or promise entered into therewith falls within the reasoning and authorities cited in *Harriman v. Southam*, 16 Ind. 190. The demurrer to the answer should have been overruled; because a promise to a body or organization of men, professing to act as a corporation, in an instance, or under circumstances, where by law a corporation of that character could not have a legal existence, does not estop the person making it from showing the facts.

Per Curiam.—The judgment is reversed, with costs. Cause remanded, &c.

J. Brownlee, for the appellant.

R. T. St. John, for the appellee.

MILLIKIN *v.* DUNCAN and Others.Nov. Term,
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VANHORN.Thursday,
December 5.APPEAL from the *Monroe* Common Pleas.

Per Curiam.—This was an action by the appellees, who were the plaintiffs, against *Millikin*, upon two promissory notes, one for the payment of \$190, and the other for \$145. The defendant answered: 1. By a general denial. 2. Payment. 3. Set-off. Replies in denial of the second and third paragraphs. The Court tried the issues and found for the plaintiffs. And thereupon the defendant moved for a new trial, upon the ground "That the finding of the Court is contrary to law and evidence;" but the Court overruled the motion, and the defendant excepted.

As the record does not profess to contain the evidence given on the trial of the cause, the exception to the action of the Court upon the motion for a new trial is not available in this Court. Moreover, the record contains no bill of exceptions, nor exception in any form, other than the one just noticed. It follows, there is nothing presented for our consideration.

The judgment is affirmed, with 5 per cent. damages and costs.

H. C. Newcomb, Paris C. Dunning and J. Tarkington, for the appellant.

MILES *v.* VANHORN.

The word "screwed" does not of itself import sexual intercourse, but it may, in certain localities, be used to impute the charge of whoredom, and where that is the case, a complaint for slander founded upon such a use of the word should affirmatively allege its import at the time and place it is used.

The following words, spoken of an unmarried female, are slanderous, viz., "She is in the family way, and I can prove by *A.*, that she has been taking camphor and opium pills to produce an abortion."

After the jury has been sworn, and a portion of the evidence heard, in an

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action for slander, it is too late for the plaintiff to amend by inserting an entire new set of words, essentially different from those previously alleged, and of themselves constituting a new cause of action.

Where, in an action for slander, the defendant, under a plea of justification, has proved facts and circumstances tending to show the truth of the charge uttered, but has not attempted to impeach the general character of the plaintiff, it is not competent for the plaintiff to introduce evidence of good character.

Thursday,
December 5.

APPEAL from the *Blackford* Circuit Court.

DAVISON, J.—This was an action for slander, by the appellee, who was the plaintiff, against *Miles*. The complaint consists of two counts. The first alleges that the defendant, on, &c., at, &c., spoke and published of and concerning the plaintiff, and of and concerning her character for chastity, these false, slanderous and defamatory words, viz., First set of words: "There is nothing the matter with her, (meaning plaintiff,) only the boys (meaning certain boys in the neighborhood of the defendant) screwed her (the plaintiff meaning,) too much at the spelling school (meaning a spelling school then lately held in the neighborhood of the defendant); then and thereby meaning it to be understood by said words, that the plaintiff had been and was guilty of whoredom, and it was so understood by Jesse Munroe and others who heard defendant speak said words."

Second set: And also these words, as a continuation of the same conversation: "There is nothing the matter with her, (meaning the plaintiff,) only she (the plaintiff meaning) has screwed the boys too much at spelling school." Then and thereby wishing it to be thought and understood that the plaintiff was and had been guilty of whoredom with said boys at said spelling school, and it was so understood by *Jesse Moore* and others at the time. Third set: "*Sarah Vanhorn* is in the family way, and I (meaning defendant) can prove by *Bob Thompson*, that she (plaintiff meaning) has been taking camphor and opium pills to produce an abortion." Then and thereby wishing to be understood that said plaintiff had been guilty of whoredom, and that she had had illicit intercourse with men, she being at the time an unmarried woman, and it was so understood by *Robert*

Thompson and others who heard him. And the plaintiff further says, that she is an unmarried woman, and that the defendant spoke of and concerning her, and of and concerning her character for virtue and chastity, the false, slanderous and defamatory words following, viz., Fourth set. "There is nothing the matter with her, (meaning plaintiff,) only she (plaintiff meaning) screwed the boys too much at spelling school; thereby intending it to be understood that she had been guilty of whoredom with certain unmarried men and boys, who had then lately attended a spelling school held in the neighborhood of plaintiff and defendant, and it was so understood at the time by *Jesse Moore* and divers others, good and worthy citizens, who heard him speak the words."

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VANDEUSEN.

Defendant demurred severally to each set of words alleged in the complaint; but his demurrers to the first, second and fourth sets, were overruled; to the second, the demurrer was sustained.

The correctness of the decisions thus made, depends upon the solution of this inquiry: Does the word "*screwed*," as used in the first and fourth sets of words, of itself, impute sexual intercourse? If it does not, then the words in these sets are not actionable; because, in the complaint there is no averment that that word was used in a criminal sense; nor is the want of such averment at all supplied by the inuendo, for the reason that that branch of the pleading can not aver a fact, or change the natural meaning of words. *Hays v. Mitchell*, 7 Blackf. 117. The definition of "*screwed*," as given in Webster's Dictionary, is, "Fastened with screws, pressed with screws, forced." This is no doubt the ordinary and correct import of the word. It may, however, when spoken in certain localities, involve the charge of whoredom; but when that occurs, the pleading founded upon it, as slanderous, should affirmatively allege its import at the time and place it is used. The appellee refers to *Rodebaugh v. Hollingsworth*, 6 Ind. 339; but that authority does not favor his view of the question; because, there the word "*screwed*" was alleged in the complaint to have a provincial meaning; and that, at the time when, and place where, it was spoken, it meant sexual intercourse. So, in *Hays v. Mitchell*, *supra*,

Nov. Term, 1861. the words, "You hooked my geese," were adjudged not actionable, *per se*; but, at the same time, it was held competent for the plaintiff, in his pleading, to have made them express a criminal charge. We are referred to *Shie'ds v. Cunningham*, 1 Blackf. 86. In that case, the words, leaving out the inuendoes, were charged in this form: "Doctor Eddy made an appointment with *Eizabeth Cunningham*, scaled the walls, and went to bed to her at Mrs. *Reperton's* house." These words were held actionable, *per se*; but that decision is plainly inapplicable to the case at bar; because *there* the words charged fairly impute sexual intercourse, while in this instance, the word in question, in its ordinary import, conveys no such imputation. *Angle v. Alexander*, 20 Eng. Com. Law, 71. The demurrers to the first and fourth sets of words were doubtless well taken. We think, however, that the third set are, as alleged, clearly actionable. It follows, the demurrer to that set was correctly overruled.

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Defendant's answer contains two paragraphs: 1. A general traverse; 2. Justification. There was a verdict for the plaintiff, upon which the Court, having refused a new trial, rendered judgment.

While the trial was in progress, and after a portion of the evidence was given to the jury, the plaintiff moved for leave to amend her complaint, as follows: "And again these words, as spoken by *Phæbe Miles*, the defendant's wife, and at the time sanctioned by him, to wit: '*Robert Thompson* has given camphor and opium pills to *Isaac Vanhorn's* wife, to doctor away a young one; and now he has given them to *Sarah Vanhorn*, (meaning plaintiff,) also to doctor away a young one;' and as an indorsement of the words thus spoken by his wife, the defendant said 'it is so, for *Bob*,' meaning said *Robert*, 'has given them to more than forty others;' thereby meaning to charge the plaintiff with whoredom and murder, and he was so understood by one *John Vanhorn*, who heard the words spoken.'" This motion, though resisted by the defendant, was sustained by the Court, and the plaintiff was allowed so to amend her complaint. We have a statutory rule of practice which says, that "the Court may at any time, in its discretion, and

on such terms as may be deemed proper, direct any material allegation to be inserted, struck out, or modified, to conform the pleadings to the facts proved, when the amendment does not substantially change the claim or defense." 2 R. S., § 99, p. 48.

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The appellee, in support of the motion for leave, &c., relies on *Lister v. McNeal*, 12 Ind. 302. But that decision, it seems to us, is not in point. There, the words charged in the original complaint were, "Old *Jane White* caught *Elzy White* and the girl, *Lisle Chapman*, (meaning the plaintiff *Delilah*.) in the barn, at the thing itself." The Circuit Court allowed the plaintiff, during the trial, to insert immediately before "Old," the words "*George Dean* said," and to strike out the name "*Lisle Chapman*," and this Court sustained its rulings. These amendments were obviously within the discretionary power of the Court; they modified, it is true, the set of words originally charged, but produced no material change in the complaint. But here, the amendment allowed embraces an entire new set of words, essentially differing from those previously alleged, and of themselves constituting a new cause of action. Such an amendment, in our judgment, is unauthorized by the statute.

In the record, there is a bill of exceptions which states "That the defendant, upon the trial, introduced evidence in support of his plea of justification, but gave no evidence touching the general character of the plaintiff, and having closed his testimony, the plaintiff produced one *Mary Munroe*, to whom she, plaintiff, propounded the question, whether she, witness, was acquainted with the general character of the plaintiff? To this inquiry the defendant objected, but his objection was overruled, and the witness testified that the plaintiff's general character was good, &c. In civil cases the general rule is, that evidence in support of the character of either party is inadmissible, until there has been an attempt, by evidence, to impeach it. 1 Phil. Ev., 4 Am. Ed. pp. 757-760, note 199. But it is argued that as the evidence in the present case is not in the record, this Court, in support of the ruling of the lower Court, will presume that evidence tending to impeach the plaintiff's

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MILLER.

character was given by the defendant, upon his plea of justification. We are not, in this instance, inclined to indulge any such presumption. The bill of exception alleges affirmatively, that no such evidence was given, and in view of that allegation it must be so intended. But the point under discussion is settled by authority. *McCabe v. Platter*, 6 Blackf. 405, was an action by a *feme sole* for words charging her with fornication. Pleas: 1. Not guilty. 2. That the words were true. After the defendant had, in the Circuit Court, closed his testimony, he having given no evidence to impeach the plaintiff's character, she offered to prove her general character to be good; the defendant objected, but his objection was overruled. Held, by this Court, that the evidence was inadmissible, and that the objection should have been sustained. So in *Houghtaling v. Kildrhouse*, 1 Comstock, 53, it was ruled that "in an action for slander, where the defendant, under a plea of justification, has proved facts and circumstances tending to show the truth of the charge uttered, it is not competent for the plaintiff, in reply to such testimony, to introduce evidence of his good character." See, also, *Cornwall v. Richardson*, 1 Ryan & Moody, 395; *Gough v. St. John*, 16 Wend. 646. These authorities are decisive that the evidence in question should have been rejected.

Per Curiam.—The judgment is reversed, with costs. Cause remanded, &c.

H. S. Kelley, *A. J. Naff* and *Walter March*, for the appellant.

D. Nation, *A. Steele* and *H. D. Thompson*, for the appellee.

LYONS, Auditor of GREENE COUNTY v. MILLER.

A. entered into a contract with the Board of Commissioners of *Greene* county, to build a bridge across *Eel* river, "according to the plans and specifications on file in the auditor's office;" the third payment on the

work was to be two thousand dollars, and was to be paid when the stone work was completed. At a regular meeting of the board, held *December 5, 1859*, it was ordered, "that the treasurer pay to *A.* two thousand dollars, it being the third payment on said contract." The auditor refused to issue the warrant, and to a proceeding by *A.* to compel him to do so, he answered, that after the board had allowed said sum to *A.*, the abutment on the east side of the creek, by reason of inartificial construction, had fallen into the river; that the board, having been called together, rescinded the order for the payment of said sum, &c.

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Held, that the allowance made by the board was an admission that the work had been done in accordance with the terms of the contract; and the allowance thus made, could not, especially in the absence of, and without notice to, *A.*, be rescinded by the board.

Held, also, that even if the auditor could have gone behind the allowance of the board, there was nothing in his answer to show that the abutment was not built according to the plans referred to in the contract.

APPEAL from the *Greene* Circuit Court.

Thursday,
December 5.

WORDEN, J.—On *June 10, 1859*, *Miller* and the Board of Commissioners of *Greene* county entered into a contract, by which *Miller* agreed "to build a bridge across *Eel* river, between *Worthington* and *Point Commerce*, according to the plan and specifications on file in the auditor's office in said county." For which the county was to pay *Miller* "\$7,000 in county orders, in the following installments, to-wit: One thousand dollars when the foundations are ready for the stone work to commence; two thousand dollars when the stone work is six feet above low water mark; two thousand dollars when the stone work is completed; one thousand dollars when the structure is raised; and one thousand dollars when the bridge is completed."

Afterward, viz., on *December 5, 1859*, the Board of Commissioners, at a regular meeting thereof, made the following order: "Ordered that the treasurer of *Greene* county pay *John X. Miller*, contractor of *Eel* river bridge, two thousand dollars, it being the third payment on said contract."

Afterward, *Miller* applied to the auditor to issue the order for the allowance thus made, who refused, and proceedings were instituted by *Miller* to compel, by way of mandate, the issuing of the order.

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v.
MILLER.

Lyons, the auditor, answered, as the reason of his refusal to issue the county order, "that at the time of the allowing of said order, the abutments and pier of said bridge had been erected; that afterward, to wit: on *December* 10, and before the issuing of the order on said allowance, the abutment on the east bank of said river, by reason of inartificial construction, fell into the river." The defendant thereupon, as auditor, deeming that the public interest required it, called a meeting of the county board on *December* 20, 1859, "to take such action as they, as commissioners of said county, may think proper and right in relation to the building of *Eel* river bridge."

The Board of Commissioners met in pursuance of the call, and, so far as appears, in the absence of *Miller*, and without notice to him, rescinded the order for the payment to him of the two thousand dollars. The auditor concludes, the allowance having been rescinded, that he is not bound to issue the order claimed.

A demurrer was sustained to this answer, and final judgment rendered for the plaintiff. This ruling is the only error complained of.

We are of opinion that the demurrer was correctly sustained. The allowance made by the board was an admission that the work had been done in accordance with the terms of the contract, so as to entitle *Miller* to the installment thus allowed. The allowance thus made could not, especially in the absence of, and without notice to, *Miller*, be rescinded by the board. We regard the order of the board rescinding the allowance as a nullity.

Reliance is had in the brief of counsel for the appellant, on the fact alleged in the answer, that the abutment, "by reason of inartificial construction, fell into the river." Even if the auditor could go behind the allowance of the board and set up this fact, there is nothing to show but that the abutment was built in precise accordance with the terms of the contract, viz., "according to the plan and specifications on file in the auditor's office." That plan and those specifications are not before us. They may have been "inartificial,"

and the abutment may have fallen in consequence of being built in strict accordance with the plan and specifications.

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1861.

Per Curiam.—The judgment below is affirmed, with costs.

CARPENTER
v.
THE
MERCANTILE
BANK.

W. Mack, H. C. Hill and I. N. Pierce, for the appellant.

WILLS v. DILLINGER and Another.

APPEAL from the *Knox* Common Pleas.

Thursday,
December 6.

Per Curiam.—The judgment in this case is reversed, on the authority of *Shuman v. Gavin*, 15 Ind. 93, and *Galletley v. Williams*, *id.* 468.

Remanded, with instructions to grant a new trial.

John Coons and J. C. Denny, for the appellant.

S. Judah, for the appellees.

CARPENTER and Another v. THE MERCANTILE BANK.

Where, to an action by a corporation, the defendant pleads the general issue, he admits the capacity of the plaintiff to sue, and can not, at the same time, plead *nul tiel corporation*, because a plea in abatement can not be pleaded in connection with a plea in bar.

APPEAL from the *Vanderburg* Circuit Court.

Thursday,
December 6.

WORDEN, J.—Action by *The Mercantile Bank of Hartford, Conn.*, against the appellants, upon a promissory note executed by them, payable at the *Mercantile Bank, Hartford, Conn.*, to *O'iver H. Smith*, and by the latter indorsed to the plaintiff.

Nov. Term, The defendants answered, 1. By general denial. 2. *Nul tiel*
1861. *corporation.*

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v.
FESLER.

The plaintiff demurred to the second paragraph of the answer, and the demurrer was sustained. Judgment for the plaintiff. The ruling on the demurrer presents the only question in the record.

The counsel for the appellee insists, that by the making of the note payable at *The Mercantile Bank of Hartford, Conn.*, the defendants admitted, and are estopped to deny, the corporate capacity of the plaintiff. On the other side, it is insisted that there is no such estoppel. It would seem that there might be a "*Mercantile Bank*," without there being a corporation. Private persons sometimes carry on banking business, and might have a bank, without having corporate franchises. But however this may be, we think the judgment of the Court was right, on other grounds.

The general denial admitted the plaintiffs' capacity, not only to sue, but to sue in this particular action; and the special answer, in the nature of a plea in abatement, was inconsistent with it, and could not be pleaded in connection with a plea in bar. *Jones v. The Cincinnati Type Foundry Company*, 14 Ind. 89.

Per Curiam.—The judgment is affirmed, with 1 per cent. damages and costs.

Conrad Baker, for the appellants.

J. G. Jones and *J. E. Blythe*, for the appellee.

KNOX v. FESLER.

Thursday,
December 5.

APPEAL from the *Morgan* Circuit Court.

Per Curiam.—This is a case of contested election. It is not a civil case. *The Lake Erie, &c. Co. v. Heath*, 9 Ind. 558. But costs follow the judgment, by the general statute, only in civil cases. 2 R. S. § 396, p. 126.

A contest of an election is a special proceeding, and

must be controlled by the statutory provisions authorizing and regulating it, as to the costs therein.

The judgment is affirmed, with costs.

W. V. Burns, for the appellant.

W. R. Harrison, for the appellee.

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1861.

WELLS
v.
MERRITT.

WELLS and Another v. MERRITT.

A. having executed a mortgage upon certain real estate, afterward sold the premises to *B.*, who agreed to pay for the same by discharging the notes and mortgage given by *A.*; and to secure the performance of his agreement, executed to *A.* a mortgage upon the same premises. Suit by *A.* against *B.*, to foreclose the mortgage.

Held, that the mortgage from *B.* to *A.*, was not a mere mortgage of indemnity, upon which *A.* could not maintain an action until he had paid the notes assumed to be paid by *B.*; but that upon the failure of *B.* to pay the purchase money, in the manner stipulated, an immediate right of action accrued to *A.* upon the mortgage.

Held, also, that the covenant of *B.* in the mortgage, to pay the notes of *A.*, was sufficient to authorize an order for execution over against him, if the mortgaged premises did not satisfy the debt.

APPEAL from the *Orange Circuit Court*.

Thursday,
December 5.

WORDEN, J.—This was an action by *Merritt* against *Wells* and wife, to foreclose a mortgage executed by the defendants to the plaintiff. Judgment for the plaintiff.

The facts are as follows, viz., *Merritt* had bought a piece of land of one *Eli Allen*, and had given him certain promissory notes for the payment of the purchase money. *Merritt* then sold the land to *Wells*, and the latter agreed, in payment therefor, to pay the several promissory notes thus given by *Merritt* to *Allen*, and to secure the performance of the agreement, executed to *Merritt* the mortgage in suit. There was a stipulation in the mortgage binding *Wells* to pay the several notes mentioned.

It is insisted that this was a mere contract of indemnity,

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1861.

CHANDLER

v.

CALDWELL.

and that no action will lie upon it, nor can any foreclosure be had, until *Merritt* shall have been damnified by being compelled to pay to *Allen* the notes mentioned. We are not of this opinion. The sale of the land by *Merritt* to *Wells*, created an indebtedness from the latter to the former. This indebtedness, by the agreement of the parties, was to be discharged by the payment, by *Wells*, of the notes given by *Merritt* to *Allen*. A failure by *Wells* to pay according to his stipulation violates the agreement, and gives *Merritt* an immediate cause of action. This view is fully sustained by the case of *Kirk et al. v. The Fort Wayne Gas-light Co.*, 13 Ind. 56, from which this case can not, in principle, be distinguished.

There was an order for execution against *Wells* for any deficit, after exhausting the mortgaged premises. This is objected to, because "there was no separate undertaking to pay any thing." The mortgage contained a covenant binding *Wells* to pay the several notes, and that was amply sufficient to justify the order of the Court. 2 R. S. 1852, § 634, p. 176; *id.* § 2, p. 239.

Per Curiam.—The judgment is affirmed, with 5 per cent. damages and costs.

J. & A. B. Collins, for the appellants.

CHANDLER and Others v. CALDWELL.

Proceedings in aid of execution against *A.*, *B.* and *C.*, alleging the issuing of an execution on a judgment against *A.*, and that *B.* and *C.* had in their hands personal property, money, rights, &c., belonging to *A.*, with which the judgment might be paid &c. Answer: 1. Denying that any execution had issued on the judgment. 2. That *B.* and *C.* held the said goods, &c., by virtue of a deed of trust executed by *A.* in favor of certain of his creditors. The Court found that *B.* and *C.* had in their hands *chose in action* belonging to *A.* sufficient to pay the plaintiff's judgment, and

ordered that they deliver over to the sheriff notes and accounts sufficient to pay the same. The judgment was rendered on the pleadings and accompanying exhibits, without any proof.

Held, that § 522 of the Code, which authorizes a proceeding against persons who may have property of the debtor in their hands, or who may be indebted to him, contemplates that the execution defendant is to be made a party with such other persons.

Held, also, that there should have been proof of the issuing of an execution upon the judgment, that fact being denied by the answer.

Held, also, that if the assignment set up in the third paragraph of the answer was valid, the judgment was wrong; and such assignment was not void because it hindered and delayed creditors, and actually prevented some, intentionally, from obtaining payment at all out of the property assigned.

Held, also, that the judgment was wrong in directing the delivery to the sheriff of accounts to be applied on the execution, as they were not subject to sale on execution without the consent of the debtor.

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1861.

CHANDLER
v.
CALDWELL.

APPEAL from the *Shelby* Common Pleas.

Thursday,
December 6

PERKINS, J.—On August 25, 1857, *James Caldwell* made an affidavit before the clerk of the *Shelby* Common Pleas, that an execution had issued upon the judgment in a certain cause, (describing it,) against the goods, &c., of *Samuel S. Chandler*, and that "*Augustus C. Handy* and *Alexander M. Hargrave* have in their hands personal goods, moneys, rights and effects of the said *Chandler*," with which the judgment might be paid, and over and above three hundred dollars' worth, &c.

The three parties named, were summoned before the Court.

The defendants answered: 1. Denying that any execution had issued on the judgment. 2. Denying, generally, the truth of each and every allegation in the affidavit. 3. Specially admitting the judgment mentioned in the affidavit, but not the execution, and averring that *Handy* and *Hargrave* had no property of the execution defendant in their hands; but that the property which they held, which had once belonged to him, was vested in them, in trust, under and by virtue of the following written instrument, executed in good faith, viz.,

"The undersigned, creditors of *Samuel S. Chandler*, each

Nov. Term, 1861. *for himself, agrees to and with said Chandler, that he, said Chandler, shall make an assignment of all his property, real and personal, except three hundred dollars' worth, to A. C. Handy and A. M. Hargrave, as trustees for our benefit, agreeing upon a pro rata division of it by said trustees, among us, to release said Chandler from any further liability to us on our claims against him; and should said property be more than sufficient, when faithfully and judiciously converted by said trustees into cash, to pay our claims in full, the overplus shall be returned to said Chandler."*

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Signed by said *Chandler*, the trustees, and thirty persons, being, as is supposed, creditors.

Demurrer to the third paragraph of the answer sustained. Final judgment for the plaintiff, as follows, viz., "that there were choses in action belonging to *Chandler* in the hands of *Handy* and *Hargrave*, sufficient to pay the plaintiffs' judgment; and that they pay over, and deliver to the sheriff, &c., notes or accounts sufficient to pay, &c., and that they be restrained," &c.

The bill of exceptions states that this judgment was rendered upon the pleadings, without any evidence, either written or parol, except the pleadings and accompanying exhibits; and that "this was all the evidence given in the cause." Our statute providing for proceedings supplementary to execution, is an article of the code, 2 R. 8., p. 152, composed of eight sections; the first four of which give proceedings against the judgment debtor alone, for the discovery of his property which may be concealed in his own or some other person's possession; and which, if discovered, might be levied on by virtue of an execution in the officer's hands.

The fifth section of the article, being § 522 of the code, gives a proceeding against other persons than the execution defendant, who may be charged with having property of the debtor in their hands, or who may be indebted to him. This section contemplates that the execution defendant is to be made a party with such other persons. *Wall v. Whisler*, 14 Ind. 228.

The remaining sections relate to matters common to the

proceedings against the execution defendant alone, and against other persons.

The proceeding in the case at bar, was commenced under § 522, against other persons than the execution defendant, though, as we have seen, he was also made a party. As this proceeding could not be instituted till after the issuing of execution, and such issue was denied, it was necessary, on the trial, to prove the issue of execution as alleged. There does not appear to have been such proof.

Again, if the assignment set up in the third paragraph of the answer, which was removed from the record by the ruling on the demurrer, was valid, then *Handy* and *Hargrave* had no property belonging to the execution defendant in their hands, nor did they at the time owe him any thing; and, on this hypothesis, the judgment was wrong. The assignment was not void on its face, as it was made before our present statute relative to assignments. It was not void on its face at common law. See Burrill on Assignments, chapters 13 and 14. It purports to assign all the debtor's property, does not show that there are any other than the creditors provided for, and contains no compulsory clause for release. An assignment for the benefit of creditors, even preferred creditors, is not void for the reason that it hinders and delays creditors, and actually prevents some, intentionally, from obtaining payment at all out of the property assigned. An assignment, or a conveyance to an individual in trust, for the benefit of the assignor, and to prevent any and all creditors from reaching the property, when necessary for the payment of their claims, would be. See Burrill, *supra*, chap. 11.

Again, the judgment was wrong in directing, even if the assignment was void, the delivering over to the sheriff of accounts to be applied on the execution. They were not subject to sale on execution without the consent of the debtor. 2 R. S., § 438, p. 136. Such sale, indiscriminately, of all choses in action, where buyers could have no knowledge of their validity, or of set-offs that might exist, would lead to a ruinous sacrifice of property. The Court should have permitted them to be collected by the assignees, or have appointed a receiver to collect them, if it held the assignment

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Nov. Term, void. 2 R. S., p. 73; How. (N. Y.) Code, 483. *Brisco v.*
 1861. *Askey*, 12 Ind. 666, indicates a judgment that might be rendered in such case.

BENTON

v.

WOOD.

Per Curiam.—The judgment below is reversed, with costs. Cause remanded for further proceedings.

R. A. Riley and *R. L. Walpole*, for the appellants.

M. M. Ray, for the appellee.

BENTON and Another v. Wood.

It is only in cases where there are installments secured by a mortgage, some of which are not due, that the Court is required to inquire as to the divisibility of the mortgaged premises.

Under § 466 of the code, it is the duty of the sheriff to determine, in a proper case, the question of the divisibility of real estate offered by him for sale; and in serving an execution upon a judgment, if the land consists of two or more lots, tracts or parcels, susceptible of division, he must sell in parcels, and no more than enough to make the debt and costs.

Thursday,
 December 5.

APPEAL from the *Lake Common Pleas*.

WORDEN, J.—Suit by *Wood* against *Benton* and his wife, to foreclose a mortgage. Judgment for the plaintiff.

The only error relied upon to reverse the judgment is, that the Court did not find whether the mortgaged premises were susceptible of division without injury, and in not ordering it to be sold in parcels.

It is only in cases where there are installments secured by the mortgage, and not due, (which was not the case here,) that the Court is required to inquire as to the divisibility of the premises. 2 R. S. 1852, §§ 637–8, p. 176.

The land in this case consists of two forty acre tracts, which lie adjoining, though in different quarters of the same section, and may constitute a small, but entire farm.

The order of the Court directed, that upon default of payment of the money, "the same shall be enforced by a sale of said mortgaged premises, on execution," &c.

This order was well enough. Under the provisions of § 466 of the code, it is evidently the duty of the sheriff to determine the question of divisibility, in a proper case. And in serving an execution upon the judgment in this case, if the land be deemed to consist of two "lots, tracts, or parcels," susceptible of a division, he would be required to sell in separate "lots, tracts, or divisions," and no more than enough to make the debt and costs; but if division could not be made, he would be authorized to offer the entire premises.

Per Curiam.—The judgment is affirmed, with 3 per cent. damages and costs.

A. McDonald, J. E. McDonald, and A. L. Roache, for the appellants.

H. C. Newcomb and J. Tarkington, for the appellee.

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1861.

SCOTT
v.
MILLER.

SCOTT v. MILLER, Administrator of GARTIN.

APPEAL from the *Allen* Circuit Court.

Friday,
December 6.

PERKINS, J.—This was a suit between two partners, for the settlement of their accounts. The cause was tried by a jury. No question arises upon the admission of evidence. There was no special finding by the jury. No instructions are in the record. There are in the record between one and two hundred pages of the evidence, closely written on foolscap, "containing," says the appellant's counsel, "volumes of figures, and long and difficult calculations, which the jury, had they been permitted to study them for a month, could not have understood;" and still, the bill of exceptions does not state that "this was all the evidence given in the cause." But even if it did, we should not, under the circumstances of this case, in other respects, examine it. This case falls directly within *Nave v. Nave*, 12 Ind. 1.

Per Curiam.—The judgment below is affirmed, with 1 per cent. damages and costs.

L. M. Ninde and H. W. Puckett, for the appellant.

W. M. Crane and W. S. Smith, for the appellee.

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1861.

CHANDLER and Others v. DAVIS.

JAY
v.
THE INDIAN-
APOLIS, & C.
RAILROAD CO.

Friday,
December 6.

APPEAL from the *Shelby* Circuit Court.

Per Curiam.—The judgment in this case must be reversed, on the authority of *Chandler et al. v. Caldwell*, ante, p. 256; and *Brisco v. Askey*, 12 Ind. 666. See *Fillson v. Scott*, 15 Ind. 187; *Graydon v. Barlow*, id. 197; *Witherow v. Higgins*, 13 Ind. 440.

The judgment is reversed, with costs. Cause remanded, &c *R. A. Riley* and *R. L. Walpole*, for the appellants.

JAY and Others v. THE INDIANAPOLIS, PITTSBURGH AND
CLEVELAND RAILROAD COMPANY.

A party by amending his plea, after a demurrer has been sustained to it, waives his right to complain of the sustaining of the demurrer. Section 382 of the code applies, alone, to demurrers overruled.

Friday,
December 6.

APPEAL from the *Madison* Circuit Court.

DAVISON, J.—This was an action by the appellants, who were the plaintiffs, against the railroad company, for failing to ship hogs delivered to her by the plaintiffs for shipment. The original complaint contains three counts. The first alleges, that on *December 1, 1855*, and continuously thereafter, until the commencement of this suit, the defendant was a common carrier, and, in her capacity and business as such, notified and held out to the public that she would transport hogs, and other live stock, over her railroad to the city of *Cleveland* in the State of *Ohio*, from any station on her road, upon delivery of such stock for transportation. And the plaintiffs aver that on *December 25, 1855*, they notified the defendant that they would, on the 30th of that month, deliver at her depot, at *Muncie*, 5,000 head of fat hogs, for shipment over said road to the city of *Cleveland*, the destination of said hogs being the city of *New York*.

And in pursuance of this notice, the plaintiffs did, on *December* 30, aforesaid, deliver at said depot, for shipment, 1,583 hogs, averaging 200 lbs. net. But the defendant, not regarding her undertaking and promise, as such common carrier, neglected and refused for a space of time, viz., fourteen days after the delivery of the hogs, to ship and transport the same to the city of *Cleveland*, as by law she was bound to do, upon the delivery thereof. Whereby the plaintiffs, during such delay, sustained damages as follows: \$880 for corn to feed the hogs, \$3,789 for loss by shrinkage, and \$200 for hands to take care of them, &c. The second and third counts are each, in substance, the same as the one just recited.

Demurrers to each count were sustained; and thereupon the plaintiffs, by leave, &c. amended their complaint. The amended complaint consists of three paragraphs, and is in form and effect the same as the original, with the exception that it relies upon a special contract between the parties, whereby the defendant, for a reward, agreed to ship and transport the hogs, as alleged in the first pleading, upon three days' notice, prior to the first day of delivery for shipment. Defendant answered by a general traverse. Verdict against the plaintiffs; upon which the Court, having refused a new trial, rendered judgment, &c.

For error, the appellants in their brief rely, alone, upon the decision of the Court sustaining the demurrers to the original complaint, while, on the other hand, it is insisted that the error, if any, in that ruling, is not legitimately before this Court. We have decided that "a party by amending his plea, after a demurrer has been sustained to it, waives his right to complain of the sustaining of the demurrer." *Polleys v. Swope*, 4 Ind. 217. This authority is cited by the appellee, and seems to be decisive of the case; and, moreover, it may be well doubted whether, in this instance, the original complaint is properly in the record. 2 R. S., § 559, pp. 159-160. It may be noted that § 382 of the code applies, alone, to demurrers overruled. *Id.* p. 123.

Per Curiam.—The judgment is affirmed, with costs.

John Davis and *Walter March*, for the appellants.

D. Kilgore, *S. Yandes*, and *C. C. Hines*, for the appellee.

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STEWART

v.

RINKER.

STEWART, GUARDIAN OF STEWART, v. RINKER, GUARDIAN OF RINKER.

A. died in 1847, testate, leaving a widow and children. By his will, he directed that all his real and personal estate should remain in the hands of his wife, until his youngest child should become of age, in trust for the support and education of his children; and that when his children should all have arrived at the age of twenty-one years, an equal division should be made among them of what might remain undisposed of. The will expressly reserved to the widow "all the rights given her by law." In 1853, the widow intermarried with one *B.*, and took with her to his house the personal property she had received under the will of her first husband. In 1858, *B.* died, leaving his widow surviving, and still charged with the trusts under the will of *A.*, one of his children not having attained his majority. Suit by the widow against the estate of *B.*, to recover the value of the personal property which belonged to her in trust for *A.*'s children, under the will of her first husband.

Held, that the widow of *A.* was entitled, as her statutory rights, reserved to her by the will, to take \$150 of the personal property, and such distributive share of the remainder as the statute gave her, (in addition to the use of one third of the real estate,) which she could dispose of as she pleased.

Held, also, that she had a right, under the will, to occupy the remaining two thirds of the real estate, jointly with the children, and to possess and use the personal property in the cultivation of the real, and to expend the income for the education and support of the children; the surplus, if any, being added to the stock, for the use of the children.

Held, also, that she would not be accountable for such of the personal property as should be lost, destroyed or consumed in the using, at least, where reasonable care was exercised by her.

Held, also, that if the portion which the widow was entitled to take in her own right, was not separated from that which she held in trust for her children until the time fixed for the final distribution, she would take in the same proportion, including the increase and income derived from the whole.

Friday,
December 6.

APPEAL from the *Morgan* Common Pleas.

PERKINS, J.—*Joseph Hiatt* died in 1847, testate, leaving a widow and children. His will contained the following provision:

"I direct that all my real and personal estate, (after payment of debts), shall remain in the hands of my wife (widow) *Lucinda Hiatt*, until such time as my youngest child that

may be living, shall arrive at the age of twenty-one years, to remain in her hands, in trust for the supporting and educating of my children. I further direct, that when all my children shall have arrived at the age of twenty-one years, then an equal division shall be made among all of my children, share and share alike, of whatever may remain unexpended for the purposes above named, reserving to my wife all her rights given her by law." See *Rumsey v. Durham*, 5 Ind. 71.

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v.
RINKER.

Hiatt owned at his death one hundred and sixty acres of land, with a dwelling-house and other improvements thereon, and personal property of the value of about eight hundred dollars. These items of property, under the will, went into the possession of the widow, who, with the children, remained in possession till 1853, when she married *Levi Rinker*, and removed with her family to his residence. She also took with her, on the removal, the personal property of which she was in possession.

Levi Rinker died in 1858, leaving his wife, the former widow of *Hiatt*, still surviving, and still charged with the trusts of *Hiatt's* will, as one of his children was yet under the age of twenty-one years; and this suit was instituted by her, against the estate of *Levi Rinker*, to recover from that estate the property, or its value, which belonged to her under the will of *Hiatt*, as a trustee for his children; and the question is, what had she a right to recover? This question must be answered by determining what her rights were under the will.

And in proceeding with the investigation, necessarily preliminary to making the determination, we may lay out of view the fact of her marriage with *Rinker*; for that marriage neither increased nor diminished her rights, under the will of *Hiatt*; though it may occasion a little difficulty in placing her in possession of those exact rights.

It may be remarked, then, in the first place, that the will does not make a provision for the widow, in lieu of dower. It gives her nothing in absolute property, and attempts to take nothing away from her. It leaves her, in express terms, her statutory rights; but it also vests in her, the right of

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using, for their benefit, for a given period of time, the portion of the estate of the deceased which belonged to his heirs, being, in this case, his children.

Suppose, then, that the widow had not again married, but had continued to reside with the children upon the homestead, the personal property, consisting of stock, such as horses, cattle, hogs and farming utensils, household furniture, &c., remaining also upon it, what were her rights under the will? They were of two descriptions, viz., absolute and fiduciary.

1. She had a right to take one hundred and fifty dollars' worth of the personal property, and such distributive share of the remainder as the statute gave her; and, in addition, the use of one third of the real estate. These, she might have had set off to her, in separate property and possession, and might have disposed of them by sale or gift, as to her seemed meet, or invested them in real estate or other property.

2. She had a right to occupy the remaining two thirds of the real estate, with the children, and possess and use the personal, in the cultivation and enjoyment of the real, paying no rent, (as the property was to be a common home for both), and to expend the entire income, after paying expenses of cultivation, for the education and support of the children remaining with her, or under her care, if she deemed it necessary; but if she did not expend it all, the surplus would accrue for the benefit of the children in the final division. She would not be accountable for such of the personal property as should be lost, destroyed, or consumed in the using, at least, where she had used reasonable care in the premises; and would only be called upon to divide, when the time for division arrived, such as actually then existed, with unconsumed income, or increase thereof. See, as to the right of the heirs to have required security from her, Story's Eq. Jur., § 604, p. 662.

But suppose no separation of the widow's portion was made, and it was kept and occupied, and used in common with that belonging to the heirs, then, on the final division, she would be entitled to take in the same

proportion, including the increase and income derived from the whole. Nov. Term, 1861.

These rules would have been of easy application had the widow not married *Rinker*. But having done so, and removed both her share, and the children's, to his residence, where they perhaps became mingled with his property, it is not so easy to ascertain what is actually left of the *Hiatt* estate, belonging to the heirs; this portion being all that is in question in this suit. She sues, in the case at bar, for the portion belonging to the children. Her own third she may have given absolutely to her husband, *Rinker*, so that they are not separable from his estate; but this question will come up when she sues the estate for her separate absolute property.

Her marriage and removal, as above mentioned, also render it somewhat difficult to ascertain how much of the *Hiatt* property and income was appropriated, and how much of *Rinker's*, to the support and education of the *Hiatt* children, as a separate account does not appear to have been kept.

But enough appears of record, to show that the Court below was not governed by correct rules, in all its calculations for the adjustment it made, and that a new investigation should take place; which, guided by the principles here laid down, as believed to be correct, may probably approximate to a just result.

Per Curiam.—The judgment is reversed, with costs. Cause remanded, &c.

W. R. Harrison, for the appellant.

W. V. Burns, for the appellee.

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MACY and ANOTHER v. THE CITY OF INDIANAPOLIS and Another.

17	287
149	672
17	287
153	343
153	572

Section 59 of the general law for the incorporation of cities (Acts 1857, p. 61,) confers upon the common council ample power to change the grade

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of a street, as well as to make any other alteration therein. And this power is continuing, to be exercised from time to time, as the wants of the city may demand; of which necessity the council is made the judge. In the absence of any legal provision authorizing it, consequential damages resulting from a change in the grade of a street can not be recovered by the property holders against the city. Such consequential injury does not come within that clause of the Constitution which prohibits the taking of private property for the public use, without compensation first assessed and tendered.

Friday,
December 6.

APPEAL from the *Marion* Common Pleas.

WORDEN, J.—Complaint by *Macy* and *Turner* against the appellees. Demurrer to the complaint sustained, and judgment for the defendants. The substance of the complaint is, that the common council of the city, in the year 1854, caused the grade of certain streets in the city to be established, and the side walks thereof to be graded and graveled. That the plaintiffs are each the owner of certain lots adjoining the streets thus graded, which have been improved with reference to such grade; the buildings thereon having been erected, fences put up, side walks graded and graveled, and shade trees planted, with direct reference to the grade thus established. That afterward, in 1859, the common council, without the consent of the plaintiffs, and without any necessity therefor, and without first having the damages assessed and tendered to the plaintiffs, changed the grade, so as to require a cut of two feet, interfering materially with the use and enjoyment of the plaintiffs' property; and which, if carried out, will compel them to alter and reconstruct their improvements, made as aforesaid, destroy their shade trees, and otherwise put them to great trouble and expense. That the common council have contracted with the defendant, *Tetcomb*, to grade and gravel the streets in accordance with the grade as thus changed, who has entered upon the work, and has hauled away earth and gravel from the street in front of the lots of the plaintiffs, respectively. Prayer, that the defendants be enjoined, and for other relief.

The questions arising upon the complaint may be resolved into two, and stated as follows: 1. Can the common council, after they have once established the grade of a street,

and after lots adjoining have been improved in conformity to such grade, cause the street to be regraded? 2. If so, can they cause it to be done without first having the consequential damages resulting from such change in the grade to adjoining proprietors, assessed and tendered to them?

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By the act of *March 9, 1857*, it is provided that "the common council shall have exclusive power over the streets, highways, alleys and bridges within such city, and to lay out, survey and open new streets and alleys, and straighten, widen, and otherwise alter those already laid out, and to make repairs thereto, and to construct and establish side walks, crossings, drains and sewers." Acts 1857, § 59, p. 61.

This section, as was said in *Wood v. Mears*, 12 Ind. 515, confers upon the common council plenary power over the streets and alleys of a city. No provision is made by law for the assessment or recovery of damages sustained by persons in consequence of a change of the grade of a street, or other alteration made therein, unless his property is to be appropriated. Provision is made, however, for assessing and paying damages "to the owner of any land or lot through which any street is proposed to be constructed or altered, or any building thereon appropriated."

The statute above quoted, confers upon the common council ample power to change the grade of a street, as well as to make any other alteration therein. When the grade has been once established, it is no more fixed and unalterable, than is the establishment of the street in any other respect. The power to fix the grade of streets is, undoubtedly, a continuing power, to be exercised from time to time, as the wants and necessities of the city may demand. *Goszler v. Corporation of Georgetown*, 6 Wheat. 593; *Smith v. The Corporation of Washington*, 20 Howard's (U. S.) R. 135; *O'Connor v. Pittsburgh*, 18 Penn. R. 187.

We come to the second question. It may be remarked that the allegation in the complaint, that the change in the grade was made "without any necessity therefor," does not change the case as otherwise made. The common council must be the judges of the necessity of the change. It is not alleged that they acted illegally, wantonly, or maliciously; or

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that they, in any manner, exceeded the powers conferred upon them by law. They having acted within the scope of their authority, the question arises, whether a person whose property is consequentially injured by the change in the grade, is entitled to damages for the injury. It would, no doubt, have been within the legitimate province of the Legislature to make provision for the payment of such damages, but they have not done so. In the absence of such provision, it is clear that damages can not be recovered against the city. It is equally clear that such consequential injury does not come within that clause of our Constitution which prohibits the taking of private property for the public use, without compensation first assessed and tendered. Many authorities are cited upon this point, but it will be sufficient to note the following. *Radcliff's Executors v. The Mayor, &c. of Brooklyn*, 4 Comst. 195; *Snyder v. The President, &c. of Rockport*, 6 Ind. 237; *The City of Lafayette v. Spencer*, 14 Ind. 399; *O'Connor v. Pittsburgh*, *supra*; and *Smith v. Corporation of Washington*, *supra*; *Trustees of Wabash and Erie Canal v. Spears*, 16 Ind. 441. A different doctrine is maintained in *Ohio*. *Crawford v. The Village of Delaware*, 7 Ohio St. R. 459. This case, so far as we are advised, stands unsupported by any decision in *England*, or in any other State of the Union; and we do not feel at liberty to follow it, against the whole current of authorities.

Per Curiam.—The judgment is affirmed, with costs.

N. B. Taylor, for the appellants.

B. K. Elliott, for the appellees.

(1) By Mr. *Taylor*, for the appellants: The power of the common council is derived from the charter. It has no power except that expressly granted, or necessarily implied, in the charter; and such power, to be valid and binding on the corporation, or third persons, must be exercised strictly according to the requirements of the charter. 8 Ind. 34; 1 Hill, (N. Y.) 545; 2 *id.* 466; 24 Barb. (S. C. R.) 427; 2 Seld. 92; 3 Denio, 249; 2 Dutch. 594.

The common council have a grant of exclusive power over the streets, &c., within the city. But this by no means gives the power to do with them as they please. It simply means that they shall have exclusive power over the streets, &c., limited by the objects and trusts for which the power is conferred. *Wood v. Meers*, 12 Ind. 521. No power is given them to

violate the admitted rights of individuals, or their own legal duties as trustees. *Lawrence v. Mayor, &c. of New York*, 2 Barb. (S. C. R.) 577; *Davis v. The Same*, 4 Kernan, 506; *Milhau v. Sharp*, 17 Barb. (S. C. R.) 435; *Gilmer v. Trustees of Carrollton*, 7 B. Mon. 680; *Williams v. Brace*, 5 Conn. 190; *Smith v. The City of New York*, 4 Sandf. 221.

Have the owners of lots bordering on a street, such an interest in the street as would entitle them to relief, if the power of the council over the streets is exercised, or attempted to be exercised, to their injury?

That they have, can not be doubted. See *Snyder v. The President, &c. of Rockport*, 6 Ind. 238; *Tate v. The Ohio, &c. Railroad Co.*, 7 Ind. 479; *Kyle v. Malin*, 8 Ind. 34; *Lawrence v. The Mayor, &c. of New York*, 2 Barb. (S. C. R.) 577; *De Baun v. The Same*, 16 id. 392; *Davis v. The Same*, 4 Kernan, 506; *Howell v. The City of Buffalo*, 1 Smith, 512.

(2) By Mr. *Elliott*, for the appellees: The common council have power to alter the grade of a street after it has been once established, and the corporation is not responsible for consequential damages necessarily resulting from the lawful exercise of such power.

The following authorities fully sustain this proposition:

Plate Glass Co. v. Meredith, 4 T. R. 794; *Boulton v. Crowther*, 2 B. & C. 703, (9 E. C. L. Rep. 227); *King v. Commissioner of Sewers*, 8 B. & C. 237; *Goseler v. Corporation of Georgetown*, 6 Wheat. (5 Curtis, 181,) 593; *Henry v. Pittsburgh Bridge Co.*, 8 Watts & Serg't, 85; *Benedict v. Goit*, 3 Barb. 459; *Radcliff's Ex'r v. Brooklyn*, 4 Comstock, 195; *Matter of Furman Street*, 17 Wendell, 649; *Wilson v. Mayor*, 1 Denio, 595; *Methodist P. Church v. Mayor, &c.*, 6 Gill, 391; *Keasy v. City of Louisville*, 4 Dana, 154; Sedg. on Damages, top p. 603; *Davis, et al. v. Mayor, &c.*, 4 Kernan, 506; *Williams v. New York Central Railroad*, 18 Barb. 246; *Ely v. Rochester*, 26 Barb. 133; Angell on Highways; *Creal v. Keokuk*, 4 Greene, (Iowa,) 47; 1 Chitty, Pl. 77, and cases cited n.; *Harris et al. v. Mayor &c.*, 1 Humphreys, 403; *Taylor v. St. Louis*, 14 Mo. 20; 14 Conn. R. 146; *St. Louis v. Gurno*, 12 Mo. 414; *Harman v. Tappenden*, 1 East, 555; *Commissioners, &c. v. Withers*, 29 Miss. 21; *Woodfolk v. Nashville, &c. Co.*, 2 Swan, 422; *Chapman v. Albany Railroad*, 10 Barb. 360; *People ex rel., &c. v. Brooklyn*, 21 Barb. 484; *Graves v. Otis*, 2 Hill, 466; 1 Am. Law Mag. 52; 1 Livingston's Law Mag. 39; *Chapman v. Albany, &c. Railroad*, 10 Barb. 360; (See opinion, *Harris, J.*, p. 362); *Drake v. Hudson Railroad*, 7 Barb. 508; *Lexington & Ohio Railroad v. Applegate*, 8 Dana, 289; *Snyder v. Rockport*, 6 Ind. 237; *Protzman v. Indianapolis & Cincinnati Railroad*, 9 Ind. 468; (See opinion, *Perkins, J.*, p. 468); *Green v. Borough of Reading*, 9 Watts, 382; *O'Connor v. Pittsburgh*, 18 Penn. 187; *Sutton v. Clarke*, 6 Taunt. 298; *Alston v. Scales*, 9 Bing. 3.

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MACY
v.
THE CITY
OF
INDIANAPOLIS.

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1861.

HARVEY and Others v. SMITH.

HARVEY
v.
SMITH.

Suit by *A.*, against *B.*, *C.* and *D.*, to recover damages for false and fraudulent representations in the sale of a newspaper establishment. The complaint averred that the defendants being the owners and publishers of a certain daily and weekly newspaper, and the owners of the printing presses, type, &c., used in publishing the same, offered to sell to the plaintiff the right to publish said paper, together with the good will, patronage, and subscription list of said establishment, as well as the fixtures and property of every kind belonging to said office; and to induce him to buy the same, defendants did then and there falsely and fraudulently represent to plaintiff that the number of paying subscribers to the daily paper exceeded three hundred, and that the number of paying subscribers to the weekly paper was at least one thousand; when, in truth and in fact, the number of paying subscribers to said daily paper did not exceed one hundred and thirty-seven, and the number of paying subscribers to said weekly paper did not exceed six hundred. That defendants further falsely and fraudulently represented that the subscription list and advertising patronage of the daily paper paid the entire expense of the establishment, leaving the subscription list and advertising patronage of the weekly paper clear profit; all of which statements were false, and known to be so by the defendants at the time, &c.; that the plaintiff relying upon said representations, purchased said paper, &c. After verdict for the plaintiff, the Court ordered the damages found by the jury to be taken and treated as a credit upon the notes given by the plaintiff for the paper, and remaining unpaid, and that the notes to that amount should be surrendered.

Held, that the number of subscribers to the paper, and the amount of the business and profits of the establishment were material considerations inducing the purchase.

Held, also, that the representations were such as the buyer had a right to rely upon, the matters concerning which they were made being peculiarly within the knowledge of the seller.

Held, also, that there was no error in the order made by the Court directing the judgment to be credited on the outstanding notes.

Friday,
December 6.

APPEAL from the *Knox* Circuit Court.

WORDEN, J.—This was an action by *Smith*, the appellee, against the appellants, to recover damages for false and fraudulent representations alleged to have been made by the defendants to the plaintiff, on the sale by them to him of a newspaper establishment. Demurrer to the complaint overruled, and exception. Issue; trial; verdict and judgment for the plaintiff.

In the brief of counsel for the appellants, three points are relied upon for a reversal. *First*, That the complaint was insufficient. *Second*, That the evidence did not sustain the verdict; and, *Third*, That the kind of judgment rendered, was unauthorized.

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HARVEY
v.
SMITH.

The complaint is quite lengthy, but enough of it will be set out to present the ground of objection. It is alleged that on, &c., at the county of *Knox*, "the defendants, under the name and style of *Harvey, Mason & Co.*, were joint owners and partners in a certain newspaper and printing establishment in the city of *Vincennes*, known as the *Vincennes Gazette*, which said newspaper the defendants before and at that time published and issued to subscribers daily, at the rate of six dollars per annum, and weekly at the rate of two dollars per annum, per copy; and in connection therewith, had before and at that time done and performed various kinds of advertising and job work. And the said defendants being then and there desirous of selling their right to publish and issue said paper, daily and weekly, as also the good will, subscription list and patronage of said *Gazette* establishment, as also all the privileges, rights, appurtenances, tools, materials, fixtures, furniture, and property of every name, nature, description and kind, used and appertaining, and in any wise belonging to said *Gazette* establishment, and before and at that time employed and used in and about said office, offered to sell the same as aforesaid to the said plaintiff; and to induce the plaintiff to become the purchaser thereof, did falsely and fraudulently say and represent to the plaintiff, that the number of paying subscribers to the daily *Gazette* exceeded three hundred; and that the number of paying subscribers to the weekly *Gazette* was at least one thousand; when, in truth and in fact, the said representations were false and fraudulent, and well known to said defendants so to be at the time they were made, in this, that the number of paying subscribers to said daily *Gazette* did not exceed, at that time, one hundred and thirty-seven, and the number of paying subscribers to said weekly *Gazette* did not exceed six hundred. And, as the plaintiff further states, the said defendants did then and there falsely

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represent to the plaintiff, that the subscription list and advertising patronage of the daily *Gazette* paid the entire expenses of the *Gazette* establishment, leaving the subscription list and advertising patronage of the weekly *Gazette* clear profit; all of which said statements were false, and so known to be by said defendants at the time they were made.

And the said defendants then and there represented that they had, about four years before that time, purchased the *Gazette* establishment at a cost of four thousand dollars, and that they had afterward purchased the "*News of the Day*" printing office, at a cost of fifteen hundred and fifty dollars, and had also purchased twelve to fourteen hundred dollars' worth of new material, all of which they had paid for from the profits of said *Gazette* establishment, and had also drawn therefrom the sum of six thousand dollars in cash, and had then owing to them about five thousand dollars, all from the profits of said establishment; all of which representations as to the profits, patronage, business, and subscription list of said *Gazette* printing office, were false, and well known by the defendants to be false, at the time they were made. And the plaintiff, relying upon the truth of the representations aforesaid, did then and there become the purchaser of said *Gazette* establishment, the good will, subscription list, &c. of the said *Harvey, Mason & Co.*, at and for the sum of four thousand and five hundred dollars. And the plaintiff avers that the presses, types, fixtures, and furniture, and materials of every description and kind, were then and there worth not to exceed two thousand dollars, and that the only consideration for the remainder of said purchase money, to wit: twenty-five hundred dollars, was the good will, subscription list, and patronage of the *Gazette* establishment, and the right to publish and issue said paper. And the plaintiff avers that while he could examine for himself the presses, materials, type, furniture, and property of the said *Gazette* establishment, he could derive no information as to the expense of said printing establishment, or as to the number of subscribers to the daily or weekly paper, or as to the amount of advertising or job work of said establishment, and the profits they had realized therefrom, except from the

defendants themselves, the plaintiff then and there being a physician, and not familiar with such business, and the costs of conducting the same, or the profits arising therefrom, as the defendants well knew; and that the plaintiff did not know any thing of the manner in which the defendants kept their accounts of receipts or expenditures, or whether any such accounts were kept, separate from their other business; and the plaintiff states that he is informed and believes that the defendants did not keep their books in such manner as would have enabled him to determine the truth or falsity of the representations as to the business income and profit of said *Gazette* establishment, prior to that time; and the plaintiff further states that he would not have made said purchase if he had not believed said representations as to subscriptions, advertising, job work, &c., and the profits arising therefrom to be true, as the defendants then and there well knew. And the plaintiff further avers that said false and fraudulent representations were made in pursuance of a previous fraudulent combination between the members of said firm of *Harvey, Mason & Co.*, to deceive and defraud the plaintiff."

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HARVEY
V.
SMITH.

The complaint alleges that the plaintiff, at the time of the purchase, paid the defendants the sum of fifteen hundred dollars thereon, and executed to them his notes for the remaining three thousand dollars, and a mortgage on the establishment to secure the payment thereof.

The objections made to the complaint may be best gathered from the following extract from the brief of counsel for the appellants:

"It will be observed that the complaint does not charge that the defendants made any false or fraudulent representations to the plaintiff as to the quantity, quality, or condition of any materials of the *Gazette* office, sold by them to him; but only that the subscription list was not, in point of fact, as large as the defendants represented it to be; and that they had not done as much business, enjoyed as much patronage, or made as much money, during the time that they had owned and conducted the *Gazette* office, as they pretended that they had.

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SMITH.

“We submit, that in order to constitute fraud by false representations, it must appear that the false representations were made with reference to a material fact, constituting a substantial inducement to the contract, and upon which the party had a right to rely. 2 Kent's Com., p. 488; 2 Parsons on Contracts, p. 270. Were these representations, though false, of such a character? We think not, for the following reasons: The plaintiff had no interest in knowing whether the *Gazette* office had, or had not, been a source of profit to the defendants; such profits, if any were made by the defendants, were not, by the terms of the contract, to be shared by the plaintiff. The losses, if any were suffered by the defendants, the plaintiff did not have to bear. He therefore had no interest in knowing any thing about the patronage or profits which the defendants had enjoyed in conducting the *Gazette* office; he would neither make nor lose any thing, whether the statements of the defendants with reference to such patronage and profits were true or false; consequently, the representations of which the plaintiff complains were of matters in which he had not, and could not have, any interest, and were, therefore, as to him, wholly immaterial. The question with the plaintiff, when he was negotiating for the purchase of this press, was not what the defendants had realized out of the subject matter of the contract, but what could he make? what patronage could he secure? The representations of the defendants, of which the plaintiff complains, did not even remotely tend to solve that question; for his success, both in securing patronage and in realizing profits, depended upon the skill, energy, and ability which he could employ in conducting the *Gazette* office, not upon the patronage, popularity, or skill of the defendants. This patronage, depending, as it necessarily did, upon the business ability, integrity and popularity of the defendants, could not be transferred to *Smith*; it could not be the subject of bargain, so as to compel the patrons of the defendants to become the patrons of the plaintiff; hence, even a false representation of the extent of such patronage did not injure *Smith*, and can not, therefore, be a ground of complaint for fraud. He purchased the *Gazette* office, with the right to publish the

'*Vincennes Gazette*,' and the right to secure the patronage of those who had been the former patrons of the defendants, and any others he could secure. This right is all that the defendants could sell, and all that the plaintiff could buy. That right has not been disturbed, and he ought not now to complain that he has been cheated, when he has got, and is now enjoying, all that he could purchase, or the defendants could sell.

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v.
SMITH.

"The plaintiff, however, insists that inasmuch as by the express terms of the contract he purchased the subscription list, the false representations of the defendants as to the number contained in that list were material, and therefore fraudulent. We answer, that the subscription list was but a part of the patronage of the office, and could not be transferred. The defendants could and did transfer to the plaintiff the right to publish the *Gazette*, and to vend it to all the world, including of course the former subscribers to the paper; but they could not transfer the subscribers; to do that would require their consent to the bargain. This proposition, we think, cannot be gainsayed. Every man has a right to choose his own paper, as a teacher for himself and family. The material of which the paper is composed, the type, ink, &c., is not the newspaper. The subscriber to a paper does not look to that; he looks to the learning, integrity and ability of the editor; he looks to the moral, political and social teachings of the paper, and he judges from that whether such a paper is a fit companion and teacher for his children. It is the brain work of the editor he buys, and not the material of the paper. The relation, therefore, which exists between the publisher of a newspaper and the subscribers, can not, for these and many other reasons which will readily occur to any one, be transferred by the former; and could not, therefore, form any material part of the consideration of the sale of this office. The plaintiff could and did purchase the material for, and the right to publish, a newspaper; a vehicle through which he could publish and vend his own peculiar moral, political, social and religious views; but he could not compel those who subscribed to the *Gazette*, as published by the defendants, to accept that

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SMITH.

paper as edited and published by himself. It necessarily follows, we think, that a representation of the defendants as to the extent of their subscription list, though false, could not injure the plaintiff; and can not, therefore, be a subject for a suit for damages.

"In order, however, to show that the representations complained of in this case were of material matters, and the proper subject of a suit for fraud, the plaintiff relied in the Circuit Court upon two authorities. The case of *Shaffer v. Sleade*, 7 Blackf. p. 178, and *Gatling v. Newell et al.*, 9 Ind. 572. These authorities, however, in our judgment, clearly do not sustain him. In both of these cases, the thing sold (in the former case it being some wax figures, and in the latter a patent right for a wheat drill,) had no intrinsic value, and was valuable only for the public favor it enjoyed. The wax figures were valuable as a show, and that depended upon the skill and ingenuity displayed in their construction. The talents, energy and learning of the owner had nothing to do with, and could not enhance, that value. The same may be said of the patent right for the wheat drill. Hence, in those cases, the true measure of the value of the subject of the contract was the public favor with which they were received; and false representations as to the extent of that public favor, were adjudged fraudulent. But the case in hand is widely different. The patronage of the *Gazette* did not depend upon the skill displayed in the construction of the press, type, or other materials of the newspaper; but upon the learning, skill, character, &c., of the editor and publisher. These qualities the plaintiff does not pretend were included in his purchase from the defendants."

We regard the complaint as sufficient.

Although the defendants could not transfer to the plaintiff the patrons of the establishment, yet it is evident that the number of subscribers to the paper, and the amount of the business and profits of the establishment, were material considerations inducing the purchase. The patrons of the establishment might, to be sure, withdraw their patronage; but, in publishing a newspaper, as well as in most other enterprises there is a material difference between obtaining

new patronage and retaining that already bestowed upon the establishment. The case of *Dobell v. Stevens*, 10 E. C. L. R. 201, is directly in point here. There the defendant was possessed of a lease for a term of years, of premises in which he kept a public house. In a treaty with the plaintiff for the purchase of the lease, together with the household furniture and fixtures, and stock in trade, he falsely and fraudulently represented to the plaintiff that the receipts for the spirits sold in the house amounted to £160 per month; and that the quantity of porter sold in the house amounted to seven butts per month; and that the tap was let for £82 per annum, and two rooms in the house for £17 per annum. The purchase being made, an action was held to lie for the false representations.

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v.
SMITH.

In another part of the brief of counsel, it is insisted that the representations, if material, were such as the plaintiff had no right to rely upon; that by exercising ordinary diligence he could have ascertained the truth or falsity of them.

The matters concerning which the representations were made, were certainly more peculiarly within the knowledge of the defendant, than that of the plaintiff. The means of information were not equally accessible to both parties. An examination of the books of the defendants might not have furnished the necessary information, even on the supposition that the plaintiff would be bound to look into them and digest their contents, instead of relying upon the statements of the defendants. But the case of *Dobell v. Stevens*, *supra*, is an authority that the plaintiff was not required to examine the books, for in that case it was shown that the defendants' books were in the house at the time of the treaty, and might have been inspected by the plaintiff. *Vide*, also, as bearing upon this point, *Hunt v. Moore*, 2 Barr, 105; *Campbell v. Whittingham*, 5 J. J. Marshall, 96.

We can not examine the case upon the evidence, as that does not purport to be all before us. The bill of exceptions, after setting out certain evidence, says, "This was all the testimony," &c. This is not in compliance with the 30th

Nov. Term, rule. "Testimony" is not synonymous with evidence. *Lindley v. Dakin*, 13 Ind. 338.

CAMPBELL

v.
LINDLEY.

The jury having assessed the plaintiff's damages at fifteen hundred dollars, the Court ordered this amount to be taken and treated as a credit upon the notes given by the plaintiff to the defendants, and that the notes to that amount be surrendered, &c. In this we see no error. The Court might undoubtedly, in virtue of its chancery powers, make such an order. The proceeding was one which contemplated a rebate from the notes of the amount of damages the plaintiff sustained by reason of the false representations.

Per Curiam.—The judgment is affirmed, with costs.

L. Q. De Bruler and *J. C. Denny*, for the appellants.

J. G. Jones and *J. E. Blythe*, for the appellee.

CAMPBELL, Executor of CAMPBELL, v. LINDLEY.

Friday,
December 6.

APPEAL from the *Washington* Common Pleas.

WORDEN, J.—*Lindley* filed his claim (a note) against the estate of *David G. Campbell*, and the executor not appearing to contest it, it was allowed, and judgment rendered in form against the defendant, *Samuel L. Campbell*, in his individual capacity. It is objected that the executor had no notice. It appears that the claim was placed upon the appearance docket, according to the provisions of the act of 1855, and this was all the notice necessary to be given. Acts 1855, p. 81.

The point as to the form of the judgment would seem to be well taken, but this error, which would seem to be clerical, could, and probably would, have been amended in the Court below, had an application been made for that purpose. No such application having been there made, the appeal must be dismissed.

Per Curiam.—The appeal is dismissed, with costs.

C. L. Dunham and *H. Heffren*, for the appellant.

R. Crawford, for the appellee.

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1861.

CLARK v. HECK.

CLARK
v.
HECK.

Suit to recover the possession of personal property, alleged to have been wrongfully taken and unlawfully detained by the defendant. Answer:

1. Property in the defendant. 2. Property in a third person. 3. Denial. The jury returned a verdict, as follows, viz., "We, the jury, find for the plaintiff; find the property in the horse to be in him, and that he is entitled to the possession, &c. We also find the value of the horse to be \$125."

Held, that the verdict sufficiently covered all the issues in the case.

The defendant asked the Court to instruct the jury as follows: That to enable the plaintiff to recover, the jury should be satisfied from the evidence that he has a general or special property in the horse in controversy, and a right to his immediate possession, and that the evidence proves either an unlawful taking, or an unlawful detention of the horse by the defendant.

Held, that the instruction was strictly correct, and should have been given.

APPEAL from the *Shelby* Circuit Court.

Friday,
December 6.

DAVISON, J.—This was an action by *Heck*, who was the plaintiff, against *Clark*, to recover a horse, alleged to have been wrongfully taken and unlawfully detained by the defendant. The answer consists of three paragraphs. 1. A general denial. 2. Property in the defendant. 3. That the horse described, &c., is the property of one *Isaac Sauries*. The issues having been submitted to a jury, they returned the following verdict: "We, the jury, find for the plaintiff; find the property in the horse to be in him, and that he is entitled to the possession, &c. We also find the value of the horse to be \$15." Defendant moved for a new trial, and in arrest; but his motions were overruled, and judgment given on the verdict.

The causes for these motions were thus assigned: 1. The verdict is unsustained by the evidence. 2. It is illegal and void, so that no judgment can be rendered upon it. 3. Error in refusing instructions moved by the defendant. 4. The verdict does not state that the horse was wrongfully taken, or unlawfully detained. As the evidence given on the trial is not on the record, the first assigned cause is not noticeable in this Court. The fourth assignment is equally unavailing.

Nov. Term, 1861. The verdict, as we have seen, "finds for the plaintiff; and that the property in the horse is in him." This, it seems to us, sufficiently covers all the issues made in the cause. *Lucas v. Stephens*, 13 Ind. 515. Another objection is made to the verdict, namely, "it was not signed by the foreman of the jury." But as that defect does not appear to have been pointed out, and presented to the notice of the Circuit Court, it is not assignable for error.

There is a bill of exceptions which shows that the defendant, at the proper time, moved thus to instruct the jury, viz., "To enable the plaintiff to recover, the jury must be satisfied from the evidence that he has a general or special property in the horse in controversy, and a right to his immediate possession, and that the evidence proves either an unlawful taking, or an unlawful detention of the horse, by the defendant." This instruction, the Court refused, and the defendant excepted. It requires neither argument nor authority to show the instruction thus refused to be strictly correct. Nor is it easy to conceive of a case of replevin to which it would not be applicable. We are of opinion that its refusal was error, and that the judgment must, therefore, be reversed.

Per Curiam.—The judgment is reversed, with costs. Cause remanded, &c.

Clark & Hackleman and *T. A. McFarland*, for the appellant.

LUCAS v. DANGERFIELD and Another.

Friday,
December 6.

APPEAL from the *Miami* Common Pleas.

WORDEN, J.—*Lucas* sued the appellees before a justice of the peace, in an action of replevin for certain wheat. Appeal to the Common Pleas, where there was a trial by jury; verdict and judgment for the defendants, a new trial being refused.

On the trial, the plaintiff, to prove title in himself, offered in evidence a judgment recovered before a justice of the peace by one *John A. Beal*, against *Dangerfield* and *Helms*, and an execution issued upon the judgment, and the constable's return thereon; by which it appears that the constable levied upon certain wheat as the property of *Dangerfield*, and sold the same to the plaintiff.

This evidence was rejected, but on what ground does not appear. We do not perceive any valid objection to the evidence offered, and none has been pointed out to us. We think the evidence was pertinent and relevant, and that it should have been admitted.

Per Curiam.—The judgment below is reversed, with costs.

N. O. Ross and *R. P. Effinger*, for the appellant.

Shirk and *Wilson*, for the appellees.

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1861.
HUSTON
v.
STEPHENSON.

HUSTON v. STEPHENSON.

APPEAL from the *Hamilton* Common Pleas.

Friday,
December 6.

Per Curiam.—Suit to foreclose a mortgage. Appearance by defendant. Rule upon him to answer; and judgment by default for want of an answer. No motion for a new trial; no exceptions; no motion to review or correct the judgment below.

The judgment is affirmed, with 5 per cent. damages and costs.

Dwitt C. Chipman, for the appellant.

J. F. Gardner, for the appellee.

Nov. Term,
1861.

KIETH
v.
KERR.

17 284
140 400
142 150
17 284
150 250

KIETH v. KERR and Another.

Suit by *A.* against *B.* and *C.*, to recover the value of hogs alleged to have been wrongfully taken by them and converted to their use. *B.* answered, that the property described, at the time it was taken by him, was in the possession of *C.*, to whom the same had been sold and delivered by *A.*, and that *C.* sold and delivered the property to him. *C.* answered, that he had contracted with *A.* for the purchase of the hogs, which were to be delivered to him on the payment of the price, but that he never paid said price, and never had the possession of said hogs, nor any right to the possession thereof, and never directed or authorized any one to convert the same. On the trial, the plaintiff gave in evidence against *B.* the answer of his co-defendant *C.* *B.* gave in evidence a written contract signed by *C.*, as follows, viz., "I have this day bought of *A.*, 16,371 lbs. gross, of hogs, amounting to \$590.48. to be paid for at the pens at *M.*" The Court instructed the jury that the contract, signed by *C.* alone, was not binding on *A.*, because not signed by him, and did not preclude him from showing by parol testimony that such writing did not embrace the entire contract.

Held, that as *B.* claimed to derive title from *C.*, the declarations of the latter, by his answer, or otherwise, were not admissible to impeach the title of *B.*, since the declarations of a vendor, made after he has parted with his title, are not admissible to affect any one claiming under him.

Held, also, that the charge of the Court, so far as it assumed that the written contract was not binding upon *A.*, was incorrect, since he was a party to the instrument, notwithstanding he did not sign it.

Held, also, that it is only where the written instrument appears on its face to be incomplete, and the proposed extrinsic testimony does not in any degree tend to contradict or vary the terms of the writing, that such extrinsic evidence is admissible to show the whole contract.

Held, also, that the contract given in evidence was incomplete, in not showing where the hogs were to be delivered, and this might have been shown by parol testimony.

Friday,
December 6.

APPEAL from the *Parle* Circuit Court.

DAVISON, J.—The appellees, who were the plaintiffs, sued *Flurey Kieth, Alexander McCune, Henry McCune, Henry McLane*, and *Reuben Lomhorn*, alleging in their complaint that the defendants, on December 20, 1857, wrongfully, &c. seized, took into their possession, drove away, slaughtered, and converted to their own use, 16,371 lbs. gross, of hogs, of the value of \$1,000, to the plaintiff's damage, &c. *Kieth*

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1861.

KIETH
v.
KERR.

answered: 1. By a denial. 2. That the property described, &c. at the time it was taken possession of by him, was in the possession of said *Lowhorn*, to whom the same had been sold and delivered by the plaintiffs, and that *Lowhorn* sold and delivered the property to him, *Kieth*, who, on the day named in the complaint, took possession of it, as he had a right to do, by virtue of said sale and delivery to him, and converted it to his own use, &c. *Lowhorn* also filed a separate answer, in which he alleges, "that on *December 24*, 1857, he contracted with the plaintiffs for fifty-three head of fat hogs, weighing, gross, 16,371 lbs., for which he was to pay \$3.50 per one hundred pounds, gross weight, on delivery of the hogs, by them to him, at the pens in *Montezuma*, *Parke* county, *Indiana*; that said hogs were, in pursuance of the contract, weighed on said *December 24*, and were to be delivered by the plaintiffs in a reasonable time thereafter, at the place aforesaid; but the same were to remain the property of the plaintiffs, until paid for at the pens aforesaid, according to the terms of the contract. Defendant avers that at no time hitherto, has he had possession, or the right of possession of said hogs; that the same were never delivered or tendered to him by the plaintiffs, nor has he paid, or offered to pay, the plaintiffs one cent on said hogs. And now, as at all times heretofore, this defendant disclaims any right of possession in, or to, said hogs, and denies that he ever directed, authorized, or gave any one leave to take possession of them; and this, his disclaimer, he enters in open court, &c. Defendant also denies that he is guilty of the trespasses alleged, &c.

The other defendants answered by general denial, &c. The issues having been completed, the cause was submitted to a jury. During the trial, all the defendants, save the *McCunes* and *Kieth*, were discharged. And upon final hearing, the jury rendered a verdict in favor of the *McCunes*, and against *Kieth*. Judgment, over a motion for a new trial, was accordingly given. *Kieth* appeals to this Court.

While the trial was in progress, the defendants having on notice to produce, &c., obtained an inspection of a written instrument executed by *Lowhorn* to the plaintiffs, gave

Nov. Term, the same in evidence to the jury. The instrument reads
1861. thus:

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KERR.

"I have this day bought of *James and S. P. Kerr*, 16,371 lbs. gross, of hogs, amounting to 590 dollars and 48 cents, to be paid for at the pens at *Montezuma*."

(Signed) "REUBEN LOWHORN."

It also appears that upon the trial, the plaintiffs, over the defendants' objection, gave in evidence the answer of *Lowhorn*. And further, it appears that the Court, the evidence being closed, thus instructed the jury: "The writing introduced by the defendants, signed by *Lowhorn* alone, and claimed by them to be the only admissible evidence of the contract between the parties, is not binding on the plaintiffs if not signed by them, and the same being in evidence, does not preclude the plaintiffs from showing by parol testimony that such writing did not embrace the entire contract." Though various errors are assigned, the appellant, for a reversal, relies alone upon two points, and they only will be noticed: 1. The admission in evidence of the answer of *Lowhorn*. 2. The instruction relative to the written instrument. The first point seems effective. The defendant claims to have derived title immediately from *Lowhorn*, and his answer is, in effect, the declaration of a vendor, after he has transferred the property sold to his vendee, going to impeach the title of the latter; such declarations should not be allowed to work that consequence. *Phoenix v. Day*, 1 Johns. 412. Indeed, the cases on this subject are uniform. "All seem to agree, that declarations made by a person under whom a party claims, after the declarant has departed with his right, are utterly inadmissible to affect any one claiming under him. 1 Phil. Ev. 4 Am. ed. note 4, pp. 314-322; *Alexander v. Gould*, 1 Mass. 165; *Clarke v. White*, 12 *id.* 439. There is, however, one adjudicated case in which "the answer of a defendant was allowed as evidence *in favor* of a co-defendant, where such co-defendant, being the depository of a chattel claimed by the plaintiff, defends himself under the title of the other defendant." *Mills v. Gore*, 20 Pick. 28. But we know of no authority for the admission of such answer, where its tendency

is to disprove the co-defendant's title. The evidence, in our judgment, should have been rejected. Nov. Term,
1861.

The remaining inquiry relates to the charge of the Court. That charge, so far as it assumes the position that the written contract given in evidence was not binding on the plaintiffs, seems to be incorrect. They were parties to the instrument, and, though they did not sign it, were evidently bound by its terms. But the substantial question involved in the instruction is, whether it was competent for the plaintiffs to show "by oral testimony that the writing did not embrace the entire contract between the parties." Mr. *Parsons* says: "Where an agreement between the parties is one and entire, and only a part of this is reduced to writing, the residue may be proved by extrinsic evidence." 2 *Parsons on Cont.*, p. 65. The rule thus stated is no doubt intended to apply where the written contract on its face appears to be incomplete, and the proposed extrinsic evidence does not, in any degree, tend to contradict or vary the terms of such incomplete contract. *Jaffery v. Walton*, 1 *Starkie*, 127. Here, the contract, with one exception, appears on its face to be complete. It does not show when the hogs sold were to be delivered to the buyer, and that, it seems to us, might have been shown by oral testimony. But the charge in question is too general in its terms; it fails to point out what might be proved consistent with the writing, in order that the contract might stand complete before the jury. It was plainly not enough to say, generally, that the plaintiffs were not precluded from showing that the "writing did not embrace the entire contract;" because such a direction to the jury might lead them to base their verdict on oral testimony in conflict with the terms and effect of the writing. We are of the opinion that the instruction is erroneous.

Per Curiam.—The judgment is reversed, with costs. Cause remanded, &c.

Bryan, *McDonald* and *Roache*, for the appellant.

KIETH
v.
KEHR.

Nov. Term,
1861.

THOMPSON, Administrator of PATE v. KERR.

THOMPSON
v.
KERR.

Suit by an assignee of a promissory note, against the administrator of his assignor, averring the insolvency of the makers of the note. The plaintiff gave in evidence the note, and the assignment thereof, and also a transcript from the docket of a justice of the peace, by which it appeared that a suit had been instituted against the makers of the note, a judgment recovered, and an execution returned *nulla bona*. The transcript showed the cause of action to have been a note for \$100, upon which a small amount of interest had accrued at the commencement of the suit, though the justice gave judgment for \$100 only.

Held, that the justice could not give himself jurisdiction by rendering judgment for a part only of the demand, and having no jurisdiction of the suit sought to be shown by the record, he had no authority to make a record which could be offered as evidence of diligence in prosecuting the note against the makers.

Saturday
December 7.

APPEAL from the *Superior* Common Pleas.

HANNA, J.—Suit by the assignee, against the administrator of the assignor, of a promissory note, averring the insolvency of the makers. Answer; denial, generally; and denial of the execution of the assignment generally; and specially, that the same had been changed by striking out a portion thereof; that the same was made in these words:

“I assign the within to bearer, without recourse back on me.

“C. B. PATE.”

And that the syllable “out,” in the word “without,” had been erased after the delivery of the same. The answer in reference to the execution of the assignment was sworn to. Reply, in denial. Trial by jury; verdict and judgment for the plaintiff.

It is objected that the evidence does not sustain the verdict.

The plaintiff gave in evidence the note and the assignment, and proved by a witness that the latter was in the handwriting of the assignor.

The defendant introduced a witness, who testified that in the latter part of *December*, 1854, or first of *January*, 1855, he was present when the deceased and the plaintiff made

a trade, by which plaintiff transferred a wagon, &c., to deceased for said note; witness did not examine the assignment placed thereon. "At the time *Pate* assigned the note to *Kerr*, he told him he must take the note without recourse, as he would as lief give his own note as to indorse one given by the makers of this. The indorsement is the same as it was at the time *Pate* gave the note to *Kerr*, except that it has been changed by striking out the word 'out,' after the word 'with,' so as to make the same read, 'with recourse' back upon *Pate*." This was all the evidence directly bearing upon the execution of the assignment.

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1861.

THOMPSON
v.
KERR

The plaintiff gave in evidence the transcript of a proceeding to judgment and execution, with a return of "no property found," by which it appeared that a suit was instituted by *Kerr*, on October 3, 1854, on a note and assignment, which is in all respects similar to that now in question, except that this is payable to "*C. Bird Pate*," and that was payable to "*C. B. Pate*;" each assignment is by "*C. B. Pate*." There was no evidence, other than said transcript, as to the institution and prosecution of a suit on this note.

The first question is, whether there was sufficient evidence of the execution of the assignment? and the second, whether there was diligence as to the makers?

As to the latter point, it is insisted that the transcript was irrelevant and improper evidence, because it is not shown to have been a suit upon the same note; and because it is shown that the justice had no jurisdiction, as the note was the only cause of action, and was for \$100, with a small amount of interest due at the time suit was instituted. The judgment before the justice was for \$100. The case of *Gregg v. Wooden*, 7 Ind. 499, is in point, unless the fact that the judgment there was for \$101, being the principal, \$100, and interest, \$1, ousted jurisdiction; while here the justice could retain it by rendering judgment for a part only of the amount apparently due; for there was no complaint limiting the demand to less than the note, and interest then accumulated.

When the sum demanded exceeds the amount fixed by the statute as the limit of a justice's jurisdiction, we are of opinion that he can not confer jurisdiction by confining

Nov. Term, his inquiry to, or rendering judgment for, a part only of the
1861. demand.

THOMPSON
V.
KERR.

This would dispose of the case, for the justice having no jurisdiction of the suit sought to be shown by the record, it appears to follow that he had no authority to make a record which should be received as evidence of diligence in the prosecution of such suit; but as the other point is made, we will examine it.

This transcript being out of the way as evidence, the question of the execution of the assignment is left to be disposed of upon the testimony already referred to, that is, the assignment, the testimony as to the handwriting of the assignor, and that of the witness who was present at the time of the transaction.

We may remark that the wording of the assignment bears internal evidence that it was intended to exclude recourse upon the assignor, for the mere indorsement of his name, or words of transfer properly signed, would secure the same end, and in a form more usually pursued; and it is to be presumed that the legal effect of such indorsement was known to those parties. It is therefore a legitimate and reasonable inference from the language employed, that it was the purpose of the assignor to guard against any liability in the event of the non-responsibility of the makers; but without further evidence than the writing as produced, perhaps that inference would be overcome by the letter of that writing.

What is the effect of such further evidence? The evidence of handwriting only shows that which was not denied by the special answer, namely, that the assignment had been executed by the assignor, but left open the question whether a part of the words originally contained in the assignment had been stricken out before, or after, the delivery thereof. Upon that point there is the testimony of but the one witness, which tends strongly to show that the alteration did not occur before, or at the time of the delivery of the note and assignment. It does not conflict with the evidence of the other witness; nor does it disclose that there was any modification of the assignor's positive terms, that he would not assign with recourse upon him. It appeared proper for us to make these

reflections, although it was not absolutely necessary for the determination of this case that the point should be decided, and we do not therefore decide it.

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1861.

Per Curiam.—The judgment is reversed, with costs. Cause remanded, &c.

BENNETT
v.
PRESTON.

E. Dumont and Green Durbin, for the appellant.

ALSHULER v. YANDES.

APPEAL from the *Fountain* Circuit Court.

Saturday,
December 7.

Per Curiam.—Complaint by *Yandes* against the appellant and another upon promissory notes, and to enforce a vendor's lien. Judgment for the plaintiff.

The only objection urged to the judgment is, that it directs the premises to be sold for the debt, without any inquiry as to a sufficiency of personalty.

No objection was made below in this respect, nor was any application made to the Court below to correct the alleged error.

The appeal is dismissed, with costs.

Huff & Jones, and *McDonald & Roache*, for the appellant.

W. H. Mallory, for the appellee.

BENNETT v. PRESTON and Others.

Defect of parties, as a cause of demurrer under the code, means too few, not too many parties.

If a complaint states a cause of action against one or more of several

17b	291
143	440
17b	291
153	494
17	291
Case 2	
160	215
17	291
Case 2	
166	364
17	291
Case 2	
169	643

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BENNETT
v.

PRESTON.

defendants, a joint demurrer by all the defendants, on the ground that the complaint does not state facts sufficient, or for defect of parties, can not be sustained; but the defendants against whom no cause of action is stated, may demur on that ground, separately.

A demurrer for want of sufficient facts will be overruled, if, on the facts stated, the plaintiff is entitled to any relief whatever, although not to that demanded.

A defect in the prayer for relief is not ground of demurrer, but for a motion to make more specific.

Quære: Whether, under our code, an action in the nature of an action on the case at law, can not be maintained against a trustee for negligence.

Saturday,
December 7.

APPEAL from the *Vanderburg* Common Pleas.

PERKINS, J.—*James H. Bennett* sues *William R. Preston* and others, and charges in his complaint that he was indebted to divers persons in a fraction over \$3,000; and that being unable to pay the debts at maturity, but having plenty of property to secure them, he did, on *November 14, 1857*, assign to said *William R. Preston*, and certain others named, his real and personal property, of the value of near \$5,000, making them a title to, and putting them in possession of, the same, to be used by them for the payment of the above mentioned debts.

He further charges, that for three years the assignees have continued in possession of the trust committed to them; that they have neglected their duty; that they have wasted and sacrificed the personal property, or converted it to their own use; that they have suffered solvent choses in action to remain uncollected till lost; that they have used the real estate for their own private convenience and profit, &c.; and, if they have paid the debts, have wasted, and are wasting, the surplus, &c. He further charges, that he has demanded an accounting and settlement, and the payment over to him of \$2,500, which sum should remain in their hands after payment of all debts and expenses. He prays for a judgment against the assignees for that sum, "and for other proper relief." He makes the creditors provided for in the deed of assignment defendants, with the assignees, and the deed of assignment is set out in the complaint. He adds a second paragraph to his complaint, upon a separate cause of action, for work and labor, &c.

The Court below sustained a joint demurrer, by all the defendants, to the complaint, and dismissed the suit. Nov. Term, 1861.

Three causes of demurrer were assigned: 1. Want of sufficient facts to constitute a cause of action. 2. Misjoinder of causes of action. 3. Misjoinder of parties defendants, in this, that there were too many defendants. The third cause of demurrer was not well assigned. It was not available. Defect of parties, under the Code, as a cause of demurrer, means too few, not too many parties; and a demurrer bad in part, is bad altogether. Voorhies' Code, 6 ed. p. 196; Ind. Dig., p. 650. The demurrer in this case was bad, in part, because if "a complaint state a cause of action against one or more of several defendants, a joint demurrer by all the defendants, on the ground that the complaint does not state facts sufficient, or for defect of parties, can not be sustained. But the defendants against whom no cause of action is stated, may demur on that ground, separately." *Eldridge v. Bell*, 12 How. (N. Y.) Rep. 549; *id.* 1756; 8 *id.* 392; 2 Abb. 402; Voorhies' Code, 6 ed. 196. Or they may be discharged on the trial. *Draper v. Vanhorn*, 15 Ind. 155. As to the second ground of demurrer, if valid, it was not cause for dismissal of the suit, but only for the docketing of the causes as separate actions. 2 R. S., p. 38.

The first cause of demurrer was not available, because the complaint made a case for some kind of relief. And a demurrer under the fifth subdivision of § 50, of the code, (2 R. S., p. 38,) viz., that the complaint does not state facts sufficient, &c., will be overruled, if on the facts stated the plaintiff is entitled to any relief whatever, although not that demanded. *Stuyvesant v. The Mayor, &c.*, 11 Paige, 415; Voorhies' Code, *supra*. Defect in the prayer for relief is not ground of demurrer, but for a motion to make more specific. See Perk. Prac. 165, 166, 658. It is held in *Eldridge v. Bell*, *supra*, that causes of demurrer must be assigned in the order of the statute, and that the passing of a prior, and assigning a subsequent cause, is a waiver of the prior. We do not decide this to be the rule in this State. See 14 Ind. 89.

What we have already said disposes of the case; but we

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PRESTON.

Nov. Term, 1861. may notice the point made by counsel, and on which the case seems to have turned below, viz., that the plaintiff's

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v.
BLOCK.

complaint is in the character of a declaration on the case at law, and not of a bill in chancery; and that such an action at law could not be maintained against a trustee.

We think the complaint in this case goes for an accounting, as in chancery; but we are not prepared to say that an action on the case could not have been maintained at common law, though we decide nothing here upon the point. A bailee, an agent, an attorney, a carrier, &c., may be sued in case for negligence; and why not a trustee? What is he but an agent? 1 Chit. Pl. 134; Story on Agency, p. 258.

In *Ingraham on Insolvency*, note to page 152, the author says: "I am well aware of C. J. *North's* observation, in *Barnardiston v. Soame*, Harg. St. Trials, p. 443, 'that no action on the case will lie for a breach of trust, because the determination of the principal thing, the trust, does not belong to the common law, but to the court of chancery;' but, he adds, 'the objection, though it might prevail in *England*, would not be regarded in *Pennsylvania*.'" See Hill on Trustees, 1 Am. Ed. p. 518. So, inasmuch as we have now but one form of action in *Indiana*, it would seem that it could not be regarded here, however it might have been at common law.

Per Curiam.—The judgment is reversed, with costs. Cause remanded for further proceedings, with leave to amend, &c.

A. L. Robinson, for the appellant.

J. G. Jones and *J. E. Blythe*, for the appellees.

KLEBER v. BLOCK.

Saturday,
December 7.

APPEAL from the *Allen* Common Pleas.

Per Curiam.—A defendant, on confessing judgment, made the following affidavit:

"STATE OF INDIANA, ALLEN COUNTY, SS:

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"Personally came before the undersigned, a notary public of said county, *Christopher Kieber*, who upon his oath saith, that he is justly indebted to the within *Adam Block* in the sum specified in the within power of attorney, and that he does not confess judgment thereon for the purpose of defrauding his creditors.

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APOLIS, & C.
RAILROAD CO.
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SHIMER.

"CHRISTOPHER KLEBER."

"Witness my hand and seal, *February 19, 1859.*

[SEAL.]

"GEO. K. HENTMAN, *Notary Public.*"

It is contended that the foregoing affidavit is bad, for want of a jurat, and 5 Ind. 109; 12 *id.* 551; Perk. Pr. 88; Bac. Abr., vol. 1, p. 99; Barb. Ch. Pr., vol. 1, p. 609; 8 Blackf. 133; Bonv. L. Dic.; and Tidd's Pr., vol. 1, p. 499 are cited. We think the jurat and affidavit are combined in the same writing. The signature and seal of the notary apply to the jurat, to the certifying part of the writing signed by *Block*. *Block's* signature applies to the affidavit part.

The judgment is affirmed, with costs.

J. Colerick, for the appellant.

THE INDIANAPOLIS, PITTSBURGH AND CLEVELAND RAILROAD
COMPANY v. SHIMER.

Where a railroad company has securely fenced their road, except at certain places where the owner of the land is permitted to erect draw bars or gates, for his own convenience in crossing said road, and by reason of the neglect of such land owner to maintain such bars or gates, his stock passes upon the railroad track and is killed, the company are not liable for the damages sustained.

The tenant of the land owner, occupying the lands, and using the crossing, or way, would be subject to the same rule of decision.

APPEAL from the *Madison* Common Pleas.

HANNA, J.—The appellee sued the company for the value

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Nov. Term, 1861. of two horses, killed by the rolling stock of the company, averring that the road was not fenced.

THE INDIAN-
APOLIS, & C.
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v.
SHIMER.

Answer: 1. Denial. 2. That the company procured, by legal proceedings, the right of way across the cultivated lands of one *Martin*, and constructed and fenced the road thereon; that afterward said *Martin*, for his own convenience, and that he might have access to his said lands south of the road, and opposite his dwelling, erected and maintained draw bars on each side of said road, in the line of said fences, and a way across said road, which was permitted by the company; that afterward *Martin* sold the land south of the road to *Makepeace*, who had land adjoining the same, upon which the plaintiff resided as tenant; that said bars were suffered to remain, as private property, from their erection until the horses were killed, and plaintiff used the same for his convenience, for ingress and egress, in passing from his dwelling, on foot, to and from the village, &c., on his ordinary business; that in consequence of the plaintiff failing to keep said bars in repair, they became insecure and rotten, so that they were blown down in the night time, and said horses passed through the opening thus made, from the field so inclosed, on to the road, and by reason of the fault of the plaintiff, and without fault of the defendant, were killed.

A demurrer was overruled to this paragraph, which presents the first point.

The statute in reference to animals killed by rolling stock of roads, and the fencing of said roads, is, in a degree, a burden to the roads of the State. It will operate fully as rigidly upon land owners through whose premises roads pass, if they are not permitted to have private ways, similar to that here described. It would be an unreasonable burden, to require the company, as between it and the land owner, to continually watch and maintain the fastenings at such private ways. It appears to us that where the company maintains a fence at all other requisite places, the permission to the land owner to pass and repass on a private way such as here indicated, is a sufficient ground upon which to exonerate such company from any liability for the

damage to his animals which might pass upon the track along such private way, in consequence of his neglect to properly maintain inclosures or fastenings where such way passes through said fences. We are not now discussing the liability to third persons.

This view would dispose of any liability which might be supposed to thus arise, to the owner of the land who should erect, &c., such way for his own benefit. The next inquiry is, whether his tenant, occupying the lands and using the way, would be subject to a like rule of decision. We can see no reason why he should not. Certainly, if a tenant should find it necessary, and should open such way, &c., he would be subject to the same obligations, and entitled to the same rights. If he uses that already opened, &c., for his ordinary and business purposes, we are not able to perceive any reason for placing him in any better condition than if he had been at the expense of opening the same. *The C. H. & D. Railroad Co. v. Watterson et al.*, 4 Ohio St. Rep. 434. We think the demurrer was properly overruled. Trial by the Court; finding and judgment for the plaintiff.

The evidence is somewhat conflicting as to the extent and duration of the user by the plaintiff of such private way, where it passed through said fence at the point where the bars were, on the south side of the road, and where the horses passed on to the track.

There is no conflict as to the facts that the bars were there, and were by some means prostrated on the night the horses were killed, and that although the fence was under the charge of the employees of the road, yet the said bars were not so considered by such employees.

As the way was not opened by the plaintiff, and there was conflicting evidence as to his user thereof, the finding of the Court below upon such conflicting evidence should prevail, under our settled rule of decision upon that point:

Per Curiam.—The judgment is affirmed, with 1 per cent. damages and costs.

John Davis, for the appellant.

John A. Harrison, for the appellee.

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HOPE *v.* COLLINS.

TYLER
v.

BORLAND.

Saturday,
December 7.

APPEAL from the *Wayne* Common Pleas.

Per Curiam.—Suit on a note. Demurrer sustained to the third and fourth paragraphs of the answer. Upon this ruling the only point in the case is made. We shall not inquire whether the ruling was right or not, since the same facts could have been proved under the fifth and sixth paragraphs of the answer, upon which issue was joined.

The judgment is affirmed, with 3 per cent. damages and costs.

W. A. Bickle and *C. H. Burchenal*, for the appellant.

J. M. Wilson, for the appellee.

TYLER *v.* BORLAND.

An answer professing to set up a total, and showing, at most, only a partial failure of consideration, is bad.

Saturday,
December 7.

APPEAL from the *Warren* Common Pleas.

WORDEN, J.—Action by *Borland* against *Tyler* upon two promissory notes executed by the latter to the former. Judgment for the plaintiff. The only question arising upon the record, relates to the sufficiency of the third paragraph of the defendant's answer, to which a demurrer was sustained. A demurrer was sustained to the first and third paragraphs, but no exception was taken to this ruling. The third paragraph was then amended, and to it, as amended, a demurrer was sustained, to which exception was taken.

The third paragraph, as amended, sets up a failure of the consideration of the notes, in this: that *Huldah Borland*, the wife of the plaintiff, had title by deed and devise from her father, to certain lands described therein, situate in said *Warren* county. That said *Huldah* was entitled by descent

to one undivided eighth of the lands of which her father, *Parker Tyler*, died seized. That at the time of the execution of the notes sued on, said *Huldah* represented to the defendant that *Parker Tyler*, who was the father also of the defendant, was indebted to her in the sum, originally, of four hundred dollars, which had been on interest for forty years, and which amounted to eight hundred dollars; that the notes sued on were executed for the conveyance of the land mentioned, and for the satisfaction of the claim aforesaid, which said *Huldah* represented that she held against their father, *Parker Tyler*, and for no other consideration, as would more fully appear by an agreement in writing between the parties, a copy of which was filed. That said plaintiff and wife have not made, nor offered to make, a deed of the lands mentioned to the defendant; and that the claim which said *Huldah* represented that she held against *Parker Tyler* and his estate had been fully settled by *Parker Tyler*, in his lifetime, and that the representations of said *Huldah* were false and fraudulent, in this: that on *June 12, 1852*, said *Huldah*, *Parker Tyler*, and the plaintiff, had a settlement of all the claims and accounts between said *Parker* and said *Huldah*, and there was found to be due to *Huldah* fifty dollars, for which *Parker* executed to her husband his note, payable one day after date; that *Parker Tyler* died after the giving of said note, and the defendant administered on his estate; that said *Huldah* filed the note against the estate, and that the defendant, as such administrator, on *October 10, 1853*, paid the same to her. Wherefore, &c.

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BORLAND

The agreement between the parties, referred to in the answer, is as follows, viz:

"Memorandum of an agreement made and concluded by and between *Matthew Borland* and *Huldah Borland*, of the county of *Medina* and State of *Ohio*, of the one part, and *William H. Tyler*, of the county of *Warren* and State of *Indiana*, of the other part: Whereas, *Parker Tyler*, the father of said *Huldah Borland*, on *April 6*, in the year *1852*, made and executed to the said *Huldah Borland* two deeds of conveyance, whereby he conveyed, or intended to convey,

Nov. Term, 1861. to the said *Huldah Borland* the following described lands, situated in *Warren county, Indiana*, viz., (here follows a description of the land.) And whereas, also, the said *Parker Tyler* did, on *July 1, 1851*, make his last will and testament, at the county of *Medina*, and State of *Ohio*, in which said last will and testament, he devised to the said *Huldah Borland* the said land; which said will and testament was signed, sealed, published and declared as such, in the presence of *S. H. Heath* and *Simon Elliott*, witnesses; and whereas the said *Parker Tyler* was indebted to the said *Huldah Borland* in the sum of four hundred dollars, received from *Oliver Taft*, the uncle of the said *Huldah*, for her use, more than forty years ago, and the interest thereon; and whereas the said parties being desirous of settling all the claims of said *Huldah Borland* in a friendly and brotherly manner, it is agreed as follows: The said *Huldah Borland* delivers over to the said *William H. Tyler* the said deeds, which now remain unrecorded in the recorder's office of *Warren county, Indiana*, to be canceled; and the said *Huldah Borland* delivers to the said *William H. Tyler* the said last will and testament; and the said *Matthew Borland* and *Huldah Borland* release to the said *William H. Tyler* all claims of the said *Huldah Borland* upon the estate of *Parker Tyler*, whether as heir at law, or otherwise, in consideration that the said *William H. Tyler* has this day executed to the said *Matthew Borland* his two several promissory notes for the sum of four hundred dollars each, with interest from date, with *Anna L. Tyler* as surety, one payable on *September 1, 1854*, and the other on *July 1, 1855*. In testimony whereof the said parties have hereunto set their hands and seals, this 10th day of *October*, A. D., 1853.

"WILLIAM H. TYLER, [SEAL.]

"HULDAH BORLAND, [SEAL.]

For herself and MATTHEW BORLAND, authorized
thereto by the said MATTHEW."

"Signed, sealed and delivered in presence of

JAMES R. M. BRYANT,

GEO. W. CLARKE."

We are of opinion that the demurrer was properly sustained. The consideration of the notes sued upon is not quite correctly stated in the paragraph. The consideration, as appears by the contract, was the surrendering up to the defendant of the deeds to be canceled, and the will, and the release of all claims of said *Huldah* upon the estate. There is nothing whatever in the contract to bind either *Borland*, or his wife, to make any deed whatever for the premises.

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v.
BORLAND.

So far as the alleged false representations concerning the claim of *Huldah* against the estate of *Parker Tyler* are concerned, we may make the following observations. The fifty dollar note, given by *Parker Tyler* to *Huldah*, would probably, taken by itself, be *prima facie* evidence of a settlement of all accounts or claims in her favor against said *Parker*. This note was paid off by the defendant, as appears by a receipt made a part of the pleading, on the same day of the execution of the notes sued upon, and the contract between the parties.

Now it would seem that the defendant should, under such circumstances, be estopped by his contract to deny the indebtedness of *Parker Tyler* to *Huldah*, it being therein explicitly admitted. But however this may be, there is another ground on which the paragraph is clearly defective. We have seen that by the contract, *Borland* and wife did not bind themselves to make any conveyance of the land. The only ground of defense, if any, is in relation to the claim of the four hundred dollars and interest. This, however, only goes to part of the consideration of the notes, what part, is wholly uncertain. The surrender of the deeds and will, and the releasing of all claims against the estate as an heir, constituted the consideration, as well as the four hundred dollar claim. The paragraph, professing to set up a total, and showing, at most, only a partial failure of consideration, was bad. *Street v. Mullin et al.*, 5 Blackf. 563.

Per Curiam.—The judgment is affirmed, with 2 per cent. damages and costs.

J. H. Brown and *J. Park*, for the appellant.

Gregory and *Harper*, for the appellee.

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1861.

MOFFITT and Others v. TILDEN and Others.

SIMMS
v.
POWELL.

Saturday,
December 7.

APPEAL from the *Marion* Circuit Court.

Per Curiam.—Suit on note. Appearance, submission of the cause to the Court, and judgment for the plaintiff. No exception was taken.

If it be said that the record does not show an appearance, and that there was judgment without notice to the parties, then it may be answered, that there was no motion to set aside or correct the judgment in the Court below, before appeal. We are satisfied, however, that the record shows, *prima facie*, an appearance. It states that the parties appeared.

The judgment is affirmed, with 2 per cent. damages and costs.

K. Ferguson, for the appellants.

J. L. Ketcham, and *James L. Mitchell*, for the appellees.

SIMMS and Others v. POWELL.

A., *B.* and *C.* executed to *D.* a written obligation, by which they acknowledged themselves to be bound to the said *D.* in the sum of \$4000, which they jointly and severally promised to pay. The condition of the obligation was stated to be, that *D.* had agreed to furnish from time to time, for twelve months from date, to *A.*, such amounts of money as he might desire, to carry on the milling business, not exceeding said sum of \$4000. *A.*, on his part, agreed to ship to *D.*, for sale, all flour manufactured at his mill during the year, and to pay to *D.* ten cents per barrel for selling, and three cents per barrel for storage, and also such commissions for the use of the money as might be agreed upon. Suit by *D.* upon the agreement.

Held, that *B.* and *C.* were not bound by the contract for the repayment of any part of the sums of money advanced to *A.*; but that they only engaged that *A.* should ship the flour, and pay the stipulated commissions and storage.

Saturday,
December 7.

APPEAL from the *Bartholomew* Circuit Court.

HANNA, J.—The following agreement was entered into by the parties, and signed by the defendants below:

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1861.

SIMMS
v.
POWELL.

"We, *Burris Moore, Lewis Simms* and *Augustus H. Abbott*, of *Bartholomew* county, *Indiana*, are held and firmly bound unto *Nathan Powell*, of the county of *Jefferson, Indiana*, in the sum of four thousand dollars, which we jointly and severally promise to pay said *Powell*, without any relief whatever from valuation or appraisement laws. The condition of the above obligation is such, that said *Nathan Powell* has and does hereby agree to furnish from time to time, for twelve months from the date hereof, to said *Burris Moore*, such amounts of money as may be convenient and desirable to enable him to carry on the milling business at *Lowell Mills*, not exceeding said sum of four thousand dollars. Said *Burris Moore* hereby agrees to ship to said *Powell* all the flour manufactured by said *Lowell Mills*, for the term aforesaid, for sale, except the home retail trade. As and for said *Powell's* services in selling said flour, said *Moore* agrees to pay ten cents per barrel, and when stored three cents per barrel for storage; said *Moore* also agrees, for services aforesaid, to pay such commissions for use of money advanced as may be agreed on by the parties hereto, from time to time.

"Witness our hands and seals, this thirtieth day of *July*, A. D., 1857.

"BURRIS MOORE, [SEAL.]

"LEWIS SIMMS, [SEAL.]

"A. H. ABBOTT," [SEAL.]

The pleadings are such as to show that sums of money largely exceeding four thousand dollars were advanced within two months following the execution of this instrument; and flour shipped, received, and disposed of, also greatly exceeding in value said sum of four thousand dollars; and *Moore* then failed. An agreed statement of facts fixes the amount so advanced, including charges, commissions, &c., at twelve thousand, eight hundred and eighty dollars; and the flour shipped, at twenty two hundred and seventeen barrels, which brought, on sale, eleven thousand, one hundred and twenty-four dollars; leaving a balance apparently due to *Powell*, of seventeen hundred and fifty-six dollars. The question is, whether, upon the writing aforesaid, *Simms* and

Nov. Term, 1861. *Abbott* are responsible for that sum. The lower Court held that they were.

SIMMS
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POWELL.

The appellee insists that *Moore*, *Simms* and *Abbott* are all bound as principals, and none of them are guarantors, assuming a collateral undertaking; that *Powell* was bound to keep *Moore* in capital, to the extent of four thousand dollars, during the year, to carry on the business, and for the same time he should be *Moore's* commission merchant, sell his flour and account to him, and at the end of the year they should all three be liable to him for any balance of such capital not exceeding said sum. That if *Powell* should in that time advance fifty thousand dollars, that would not defeat the claim for the balance, not exceeding four thousand. For the appellants it is urged, that the bond was not intended to, and does not, secure the repayment of the money advanced; but secures the performance of certain other acts, namely, the shipping of flour to the said *Powell*, and payment to him of the commissions named, &c. And, secondly, if this is not so, then *Simms* and *Abbott* are not bound for advances to *Moore*, exceeding in the aggregate four thousand dollars; and that as the pleadings and agreement show that more than that amount had been realized out of the flour shipped, and was applied by *Powell* on the advances made, the liability of the said sureties thereupon ceased.

We are asked to give a construction to the instrument. We are of opinion that *Simms* and *Abbott* were not bound for the repayment of any part of the sums advanced to *Moore*. They only engaged that *Moore* should ship certain portions of the flour made by him to the plaintiff, and should pay for storage thereof three cents per barrel, and ten cents for selling, and commissions as might be agreed. These things were to be done, or they engaged to respond in damages if they were not done by *Moore*.

Perhaps if said commissions, &c., had not been retained, or deducted out of the proceeds of sales made by *Powell*, he could have held *Simms* and *Abbott* responsible therefor; and thus have applied the whole of such proceeds toward repaying advances made by him. But in the agreed statement

of facts, his account is not so rendered. He there shows that such commissions, &c., amounting to five hundred and forty dollars, were deducted from the proceeds of sales; and for the balance, this suit is brought. No complaint is made for failure to deliver flour during the whole time agreed upon. The balance, for which the suit is thus shown to have been brought, was for money advanced, exceeding the proceeds of shipments made. We can not conclude but that under this contract, advances thus made, over and above the shipments received, were at the risk of the commission merchant.

Per Curiam.—The judgment is reversed, with costs. Cause remanded, &c.

S. Stansifer and *R. Hill*, for the appellants.

Jer. Sullivan and *G. E. Walker*, for the appellee.

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1861.
BUCKINGHAM
v.
THE STATE.

BUCKINGHAM v. THE STATE.

Information charging that the defendant failed and refused to take and subscribe an oath attached to a certain tax list, known as "Statement No. 1," when the same was presented to him by the assessor on, &c.

Held, that no offense was charged in the information, the character of the affidavit which the defendant refused to sign not being shown with sufficient certainty.

APPEAL from the *Cass* Common Pleas.

Saturday,
December 7.

WORDEN, J.—Information against the appellant. Motion to quash overruled, and exception. Trial, conviction and judgment.

In this case we find no brief, but it was submitted in 1855, the record in the mean time having been mislaid, and we have reason to believe a brief for the appellant was once filed; we therefore examine the errors assigned, without the aid of a brief; the first of which is that the Court erred in refusing to quash the information.

The information charges, that "on April 6, 1855, at *Eel* township, *Cass* county, and State of *Indiana*, the defendant,

Nov. Term, 1861. of full age, over twenty-one years old, a man of sound mind, a resident of said township, and liable to be taxed therein, did then and there unlawfully refuse and fail to take and subscribe an oath (affidavit) attached to a certain tax list, known and called 'Statement No. 1;' said tax list Statement No. 1, was then and there presented to said *Buckingham* by *John H. Herbert*, the lawful assessor of said township, duly elected and qualified, between *January 1* and *May 1*, 1855, and the said assessor then and there requested the said *Buckingham* to take and subscribe said oath (affidavit) attached to said tax list Statement No. 1, but the said *Buckingham* then and there refused and failed to do so, as aforesaid mentioned, at the time and place aforesaid."

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v.
THE STATE.

The most that we can make of the charge is, that the defendant refused to take an oath which was attached to a certain tax list, known as Statement No. 1.

The information, we suppose, was intended to be based upon § 77 of the act defining and punishing misdemeanors, (2 R. S. 1852, p. 446,) which makes it an offense for a person, when requested, &c., to "fail to give a true list of all his taxable property, or to take and subscribe any oath in that behalf, as required by law."

The 23d section of the act on the subject of the assessment and collection of taxes, (1 R. S. 1852, p. 109,) requires two statements of property subject to taxation to be made out; to the first of which a prescribed affidavit of the tax payer is required to be attached. Now it does not appear from the information that the affidavit which the defendant refused to make was such as was "required by law." The affidavit is not set out, nor is there any thing to show the nature and character of the oath refused. We can not infer that because the affidavit was attached to the statement, that it was such an affidavit as the statute requires. Nor is it alleged that the defendant refused to make any affidavit at all. The allegation is that he refused to make the particular affidavit which was attached to the statement. There may have been good reasons for not making the affidavit tendered. It may not have been such as the law required, or it may not have been true.

We are of opinion that no offense is charged in the information, and that the motion to quash should have prevailed. Nov. Term,
1861.

Per Curiam.—The judgment is reversed.

D. D. Pratt and S. C. Taber, for the appellant.

D. C. Chipman, for the State.

CARDER

v.

THE STATE

CARDER v. THE STATE.

Prosecution for an assault and battery with intent to commit murder.

The indictment charged "that *A.*, on, &c., at, &c., did then and there unlawfully and *feloniously*, in a rude, insolent and angry manner, touch and strike one *B.*, with intent then and there unlawfully and feloniously, and with premeditated malice, to kill and murder the said *B.*, by shooting him in the back with a gun loaded with powder and shot, which gun the said *A.* then held in his hands," &c.

Held, that the words "with intent," &c., as used in the indictment, sufficiently expressed the meaning of the word "purposely," as used in the statutory definition of murder; and that the word "feloniously," in the connection in which it was used in the indictment, was identical in its import with the word "purposely."

APPEAL from the *Tippecanoe* Circuit Court.

Saturday,
December 7.

DAVISON, J.—This was a prosecution for an assault and battery with intent to murder. The indictment charges "that *Albert Carder*, on, &c., at, &c., did then and there unlawfully and *feloniously*, in a rude, insolent and angry manner, touch and strike one *Harvey S. Dale*, with intent then and there unlawfully and *feloniously*, and with premeditated malice, to kill and murder the said *Harvey S. Dale*, by shooting him in the back with a gun loaded with powder and shot, which gun the said *Albert Carder* then held in his hands," &c.

Defendant moved to quash the indictment; but the motion was overruled, and he excepted. Plea, not guilty. The issues were submitted to the Court, who found the defendant guilty, &c., and having refused a new trial, rendered judgment upon the finding. The indictment is said to be defective, because in charging the offense it omits the word "purposely." We think otherwise. The code says: "Words used in the statute to define a public offense need not be

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1861.

BRIGHT
v.
MARKLE.

strictly pursued; but other words conveying the same meaning may be used." 2 R. S., § 59, p. 368. The word "purposely" is used in the statutory definition of murder; but it seems to us, that its meaning is fully expressed in this indictment by the words "with intent." And moreover the word "feloniously," in the connection in which it is used in the pleading, seems to be identical in its import with the word "purposely." We perceive no reason why the former word may not, in this instance, be held equivalent to the latter. The motion to quash was not well taken.

Again, it is said that the indictment was not properly returned into Court. There is no ground for this objection, because the record shows, affirmatively, that the indictment was found by the grand jury, indorsed by their foreman as "a true bill," and returned by them into open court.

The evidence is upon the record. We have examined it carefully, and are of opinion that it sustains the finding of the Court.

Per Curiam.—The judgment is affirmed, with costs.

W. C. Wilson, for the appellant.

John L. Miller, for the State.

BRIGHT v. MARKLE.

Suit by *A.*, an ex-county treasurer, against *B.*, to recover the amount of certain taxes assessed against him, and which *A.*, when county treasurer, had charged up to himself, and for which he had accounted. Answer: The general denial. On the trial, the plaintiff was permitted to prove by parol that the lands upon which the taxes had accrued were assessed to *B.*, without producing the assessment roll or tax duplicate, or showing any excuse for their non-production.

Held, that the testimony was erroneously admitted.

Saturday,
December 7.

·APPEAL from the *Marion* Common Pleas.

PERKINS, J.—*Indiana* has the following statutory provision:

"Whenever any county treasurer or collector for any previous year, shall have charged himself with, and accounted for, any tax that shall not have been paid to him, such tax

shall be deemed and taken as due him personally, whether in or out of office, and may be by him collected in the same way as other taxes due and unpaid are collected." 1 R. S., § 105, p. 131.

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1861.

SCOTT
v.
SCOTT.

Jacob Markle was treasurer of *Jasper* county, *Indiana*, and alleges that he charged himself with taxes due from *Bright* and *Dunn*, and settled with the auditor for them. He now sues *Bright* and *Dunn* in an ordinary civil action for the amount, as for money paid to their use.

In the Court below, *Dunn* made default; *Bright* answered by a general denial. This threw upon *Markle* the burden of making out his case.

To prove that the lands were assessed to *Bright* and *Dunn*, he did not offer the assessment roll, or tax duplicate, but, as the bill of exceptions shows, was permitted, over the objection of *Bright*, to prove the fact by parol, without showing any excuse for not producing the written evidence. That this was error there can be no doubt, and it was made the ground of a motion for a new trial. The assessment roll is not a written instrument; but it is in writing. See *Kinney v. Doe*, 8 Blackf. 350; *Smith v. The District Trustees, &c.*, 5 id. 40.

Per Curiam.—The judgment is reversed, with costs. Cause remanded, &c.

C. L. Dunham and *Gordon Tanner*, for the appellant.

H. O'Neal, for the appellee.

SCOTT v. SCOTT.

17	309
140	550
17	309
152	441

Suit for a divorce, by a husband against his wife, charging cruel treatment, &c. The defendant answered, admitting the allegations of the complaint; and an agreement was made and filed by the parties, relating to the disposition of their children and property. The cause was submitted to the Court upon the pleadings and said agreement, without other evidence, and a divorce was refused.

Held, that under the general chancery practice, a default did not, in suits for divorce, as in other suits, supersede the necessity of proof, or lighten the burden resting on the plaintiff to establish the charges preferred; but

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a default, acknowledgment, or consent for judgment, by the defendant, it was generally supposed, settled the case as against him, so that he could not complain of any lawful disposition the Court might afterward make of it.

Held, also, that it would appear to follow that if the defendant, being the wife, should admit of record the charges in the complaint entitling the plaintiff to a divorce, she would deprive herself of the right, under our statute, to an order for alimony, during the pendency of the proceedings.

Held, also, that the public interests, and the rights of third persons not before the Court, require that the State shall exercise some control over the marital relation, and that suits for divorce are not mere actions between the parties to the marriage contract, to be governed by the ordinary rules of procedure in civil suits; and hence, our law requires the prosecuting attorney to resist all applications for divorce, that are not otherwise defended.

Held, also, that the Court below did not err in refusing a divorce.

Saturday,
December 7.

APPEAL from the *Grant* Circuit Court.

HANNA, J.—*Samuel Scott* filed his complaint, praying a divorce, and charging *Mulilda Scott*, his wife, with cruel and inhuman treatment toward him, in this: that she was a consummate scold, giving him no peace when in her presence, neither day nor night; that she was of violent temper, and threatened to inflict upon him personal injuries, to such a degree that he had not for two years considered it safe to lodge under the roof with her, and had therefore been compelled for that time to absent himself from his home, through fear of his life, or great violence; and had failed in repeated efforts to conciliate her, that they might live together.

The defendant filed an answer, not sworn to, admitting the allegations in the complaint, and stating that they were true; and, the record states, the parties filed an agreement, which appears, and is in reference to the disposition of their children and property. It is refreshing to see that they agreed twice in a long life; once, that they would be united, and again that they would be separated.

The case was submitted upon the pleadings and said agreement. The court refused a divorce; and overruled a motion for a new trial. Was the ruling correct, is the only question in the record.

Counsel for the appellant take it for granted that the charges and allegations in the complaint, if true, entitled the applicant to a divorce. Waiving an inquiry into that matter,

*He! He! scold
Jones
Samuel Jones!*

for the present, but assuming the position to be correct, we proceed to the question on the pleadings. Should a divorce have been granted upon the pleadings alone?

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1861.

SCOTT
v.
SCOTT.

Under the general chancery practice, a default did not, in suits for divorce, as in other suits, supersede the necessity of proof, or lighten the burden resting on the plaintiff in establishing the charges preferred. *Pa'mer v. Palmer*, 1 Paige, 276; *Van Veghten v. Van Veghten*, 4 Johns. Ch. 531; 1 *id.* 488; *Barry v. Barry*, 1 Hopkins, 118; *Welch v. Welch*, 16 Ark. 527. But a default, acknowledgment, or consent for judgment, by a defendant, it was generally supposed, settled the case as against him, so that he could not complain of any lawful disposition the Court should afterward make of the case. It would appear therefore to follow, that if the defendant, being the wife, should admit of record charges in the complaint entitling the plaintiff to a divorce, she would deprive herself of the right, under our statute, to an order for alimony, during the pendency of the proceedings.

Formerly, it was supposed that not only the parties to the record, plaintiff and defendant, but also a third party, the government, was so far interested in such proceedings as to guard against divorces by collusion, even when "they both appear and confess the matter upon which a sentence of divorce was to pass." *Collett's case*, 2 Mod. 314; *Cobbe v. Garston*, Milward, 529, 537; *Whittington v. Whittington*, 2 Dev. & Bat. 64; *Berthelemy v. Johnson*, 3 B. Mon. 90; *Gould v. Gou'd*, 2 Aikens, 180. This rule has been carried so far as to forbid divorces upon the sole evidence of the confessions of the defendant out of Court. See cases above cited. Still, such confessions may be heard, and receive such weight as they are entitled to, in connection with other evidence. *Holland v. Holland*, 2 Mass. 154; *Mortimer v. Mortimer*, 2 Hag. Con. 310; *Matchin v. Matchin*, 6 Barr, 332. But should be well considered, and cautiously weighed, because they often affect persons not before the Court as parties, namely, the children of the parties.

We come to the question whether our statute changes this rule, long established upon this subject. Whether under the law declaring marriage a civil contract, 1 R. S. 1852,

Nov. Term, §1, p. 361, a suit to annul such contract, or to dissolve the
 1861. obligations thereby entered into, is now a mere action between the parties to such contract, the man and the woman, and governed by the usual and ordinary rules of procedure in civil suits.

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 v.
 SCOTT.

We are not at liberty to consider the statute "declaratory of the law regulating marriages," above referred to, alone, but must also, in connection therewith, examine that "regulating the granting of divorces," 2 R. S. 233; the last section of which, p. 238, is, that "whenever a petition for divorce remains undefended, it shall be the duty of the prosecuting attorney to appear and resist such petition."

If the theory that the government has some interest in, and something to do with, the status of the citizen, does not prevail, we are not informed of the necessity of this latter statute. Where such a suit remains undefended, a government officer, one who stands as the representative of the government in bringing offenders against the criminal laws to justice, is thus commanded to resist such petition. Why is this? Is it not because persons not before the Court will be affected by its action in the premises? Is it not because public policy requires that government shall exercise some control in reference to this relation in life? If government can not, or should not, exercise this control, why pass laws at all to regulate marriage and divorce? Why not leave the husband, as of old, to write his wife a bill of divorcement and give it to her in her hand, and send her out of his house Deut. xxiv, 1-4.

The marriage relation is more sacred; the obligations imposed thereby, it appears to us, somewhat different from those resting upon parties in a mere contract for the purchase of a mule or a hog.

With this view of the subject generally, and of the law as it existed at the time of the adoption of our statute, we are prepared, so far as necessary, to consider that portion thereof relied on by the appellant. It is §13 of the last quoted statute, namely, "The defendant shall answer said petition under oath, if required so to do by the petitioner; but no decree shall be rendered by default, without proof; nor

shall any admissions made in said answer be used as evidence in any other case against said defendant, nor shall the denial under oath, by the defendant, of the facts alleged in the petition, render necessary any other or further proof by the complainant than would have been necessary if such denial had not been under oath."

It is argued that because it is thus provided that the admission made in the answer shall not be used in any other suit, therefore the inference is strong that it should be used in the suit pending.

It might be admitted that it could be used as evidence in the pending controversy, and yet, considering this statute alone, or in connection with former adjudications, it would not follow that it should be considered as either sufficient or conclusive. *McCulloch v. McCulloch*, 8 Blackf. 60. But it is then argued that marriage being under our statute a civil contract, an application for divorce should be considered in the light of a civil suit, and governed by the rules prescribed in such suits, one of which is that "every material allegation of the complaint not specifically controverted by the answer, shall, for the purposes of the action, be taken as true." 2 R. S., § 74, p. 44.

We have already said sufficient upon this branch of the subject, as to the effect of the answer of the defendant upon her rights, and in relation to the intervening rights of the government, guarding the question of public policy and the interests of persons not before the Court, &c. The rights of this third party are supposed to be in the care of the constituted tribunals. *Cross v. Cross*, 3 Paige, 139. We perceive no error in the conclusion arrived at by the Circuit Court upon the admissions in the pleadings.

Per Curiam.—The judgment is affirmed, with costs.

H. S. Kelley and *J. A. Jones*, for the appellant.

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v.
SCOTT.

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1861.

MERRITT v. COBB.

MERRITT

v.

COBB.

Suit upon a promissory note. Answer: want of consideration, specially setting out the facts. The plaintiff moved to strike out the answer, as a false and sham pleading; and in support of his motion filed affidavits which tended to show the several matters alleged in the answer to be untrue; and the defendant having declined to affirm his belief as to the truth of his answer, or to give any evidence that the same was true, or that it was filed in good faith, the Court sustained the motion.

Held, that neither the motion nor the affidavits made any part of the record, on appeal, there being no order of the Court or bill of exceptions making them such.

Saturday,
December 7.

APPEAL from the *St. Joseph* Common Pleas.

DAVISON, J.—The appellee, who was the plaintiff, sued *Merritt* upon a promissory note for the payment of \$358. The note bears date *March 1, 1858*, and is payable to the plaintiff, four months after date, at the branch at *South Bend*, of the *Bank of the State of Indiana*.

The defendant's answer alleges these facts: The note was given upon, and at the time of, a contract for the purchase of certain furniture, consisting of beds, bedding, &c., the same comprising the whole of the furniture and fixtures then in the *St. Joseph's Hotel*, at *South Bend, Indiana*. The contract of purchase was made between the defendant and one *William Butts*, the tenant in possession of the hotel, who also held possession of its furniture and fixtures. At the time of the purchase, and the execution of the note, the property was not delivered to the defendant; but it was then expressly agreed that *Butts* should deliver the same within two weeks thereafter. The plaintiff, when the purchase was made, held an interest in, and a lien upon, said property, and was at that time present, and at the request of *Butts* and the plaintiff, the defendant executed the note to plaintiff, and the same was made payable to him upon no other consideration whatever. After this, on the day fixed by agreement for the delivery of the furniture, &c., of said hotel, *Butts* pretended to deliver to the defendant the whole of the property contracted for, and defendant entered into possession of the hotel and of the furniture, &c., so delivered

17 314
40 205
40 472
17 314
40 369

to him, the said *Butts* then and there representing to the defendant that all the property contracted for, and on account of which the note was given, was then delivered to the defendant; and relying upon said representation, the defendant was induced to accept the furniture, &c., so delivered, when in truth and in fact the said *Butts*, with the knowledge and by the consent and connivance of the plaintiff, had, prior to that time, and after the execution of the note, fraudulently concealed and boxed up a large amount of furniture, (setting forth the articles so concealed, &c.) amounting in value to \$600; and the said *Butts*, with the advice, counsel and connivance of the plaintiff, fraudulently and secretly, and without the knowledge or consent of the defendant, removed the furniture, &c., so concealed, &c., from said hotel, and failed to deliver the same to the defendant. Wherefore the consideration of the note has failed, &c.

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1861.

MERRITT
v.
COBB.

To this answer the plaintiff filed a demurrer, which was sustained by the Court; but subsequently, on his motion, the judgment sustaining the demurrer was set aside, and thereupon he withdrew his demurrer. It appears in the transcript, that the plaintiff, upon the withdrawal of his demurrer, moved to strike out the answer, as a *false and sham pleading*; and, in support of the motion, filed three affidavits which tended to show the several matters alleged in the answer to be untrue; and the defendant having declined to affirm his belief as to the truth of said answer, or to give any evidence that the same was true, or that it was filed in good faith, the Court sustained the motion. Final judgment was given for the plaintiff. The action of the Court in sustaining the demurrer is assigned for error; but of that, the appellant has no right to complain, because the judgment of the Court upon that ruling was subsequently set aside, and the demurrer withdrawn.

The next assigned error is, that "The Court erred in sustaining the plaintiff's motion to strike out the answer of the defendant as a false and sham pleading, upon affidavits, &c." As there is no bill of exceptions, or order of the Court, making the motion to strike out, or the affidavits in its

Nov. Term, 1861. support, a part of the record, the inquiry at once arises, whether the ruling upon that motion is properly before us.

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v.
MAFFETT.

The statutory rule is, that "A transcript of motions, affidavits and other papers, when they relate to *collateral matters*, and depositions filed as mere evidence, shall not be certified, unless made a part of the record by exception, or by order of the Court." 2 R. S., § 559, pp. 159, 160. The motion, in this instance, is evidently collateral to the main inquiry in the case, and is therefore within the rule just recited; and the affidavits are equally so, because they were filed "as mere evidence" in support of the motion. It follows, neither the motion nor the affidavits were made part of the record in the mode prescribed by the statute, and should not therefore have been included in the transcript. *Kirby v. Cannon*, 9 Ind. 371; *Shaw v. Bickard*, 10 *id.* 227; *Murphy v. Tilly*, *id.* 311.

Per Curiam.—The judgment is affirmed, with 3 per cent damages and costs.

Miller and George, for the appellant.

Thos. S. Stanfield, H. C. Newcomb and J. Tarkington, for the appellee.

SHIEL v. MAFFETT.

The *Morgan* Circuit Court having, at its regular term, entered upon the trial of a contested election case, which it was expected would consume the residue of the term, made an order discharging the parties and witnesses in all other cases. The election case was unexpectedly disposed of long before the close of the term, and the Court having entered of record the foregoing facts as a reason for the adjournment, directed the clerk to give notice of an adjourned term of Court, to be held on a day fixed by the order.

Held, that the record sufficiently set forth the ground upon which the adjournment was ordered, and that the adjourned term was legally held.

Saturday,
December 7.

APPEAL from the *Morgan* Circuit Court.

DAVISON, J.—This was an action by *Maffett* against *Shiel*

upon two promissory notes, and also upon an account. And the cause being at issue, the said Court, on the seventh judicial day of the *November* term thereof, 1859, caused the following, among other things, to be entered of record, viz.,

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SHIEL
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MARFERT.

"Be it remembered, that on the fifth day of the present term, the Court having begun the trial of the case of *John L. Knox v. William Feeler*, for contesting an election, and it then appearing that said case would probably occupy all the balance of the term, the witnesses and parties in other cases were discharged; and afterward, on the eighth day of the term, the aforesaid case of *Knox v. Feeler* was suddenly terminated, on account of the contestee having abandoned the contest; and it therefore became necessary for the Court to adjourn, on account of the witnesses and parties in other cases having been discharged as aforesaid." And on the same day, and at the same term, the Court made the following order, viz.,

"It is ordered that this Court now adjourn until *February* 6, 1860, and that the regular petit jury of this term be then present, without further notice, and that the clerk give notice of this adjournment by publishing a copy of this order in each of the newspapers published in this county, at *Martinsville*, for at least three weeks, beginning with the first issue of each paper after the date of this order."

The record further shows, that afterward, at the said adjourned *November* term, held, &c., on *February* 6, 1860, the present cause was, by consent of the parties, submitted to the Court for trial; that there was a finding for the plaintiff, and that the Court, having refused a new trial, rendered judgment, &c.

The ground relied on for a reversal is, that for the adjournment to *February* 6, 1860, there are no reasons shown in the adjourning order; that the adjournment was therefore inoperative, and that the judgment having been rendered at such adjourned term is, consequently, a nullity. This position is untenable. It is true, "the reasons for an adjournment before the close of the term, to a day in vacation, should appear of record." See *Morgan v. The State*, 12 Ind. 448; *Slaughter v. Gregory, et al.* 16 Ind. 250. But these decisions

Nov. Term, 1861. can not be held applicable to the case at bar, because the record before us sufficiently shows the grounds upon which the adjournment, in this instance, was ordered. It follows, the adjourned term commencing *February* 6, 1860, was legally held, and the judgment is therefore operative, and binding on the parties.

THE CITY
OF
LOGANSPOBT
V.
BLAKEMORE.

Per Curiam.—The judgment is affirmed, with 5 per cent. damages and costs.

W. V. Burns, for the appellant.

J. W. Gordon and *J. A. Beal*, for the appellee.

ROOKER v. HANNAMAN.

Saturday,
December 7.

APPEAL from the *Marion* Common Pleas.

Per Curiam.—Action by *Hannaman* against *Rooker*, on promissory notes. Issue; trial by the Court, and finding and judgment for the plaintiff.

The record presents no question for our decision; there being no motion for a new trial, nor any valid exception taken to any ruling of the Court below.

The judgment is affirmed, with 5 per cent. damages and costs.

T. D. & R. L. Walpole, for the appellant.

H. C. Newcomb and *J. Tarkington*, for the appellee.

THE CITY OF LOGANSPOBT v. BLAKEMORE

17 318
Case 2
184 552

Street improvements must, under the act of 1857, (Acts 1857, p. 63,) be executed under a contract with the city council; and such contract must be evidenced either by a formal instrument in writing, signed by the parties or their agents, or a written proposition from the contractor,

containing all the particulars of a contract, which must be accepted by the council. Nov. Term,
1861.

A transcript of the proceedings of the council in the matter of a street improvement, must contain a copy of the contract, or a *prima facie* liability will not be shown against the property holder.

THE CITY
OF
LOGANSPOBT
V.
BLAKEMORE.

APPEAL from the *Cass* Common Pleas.

PERKINS, J.—*McBride*, a contractor for a street improvement in *Logansport*, made an affidavit on which he obtained a precept against *Blakemore*, a property holder on the street improved, pursuant to the charter of the city. Monday,
December 9.

Blakemore appealed to the Common Pleas. The city clerk sent up a transcript of the proceedings of the city council, as required by the charter when an appeal is taken. In the Common Pleas, the appellant demurred to the transcript as a cause of action. The demurrer was sustained, and the proceedings were dismissed.

The transcript contains the copy of a contract for the street improvement in question.

Street improvements, such as that made in this case, we may observe, must be executed under contracts, and such contracts must be evidenced by writing. There must be a formal contract drawn up and signed by the parties, or their agents; or there must be a bid, or proposition, from the contractor, containing all the particulars of a contract, which must be accepted by the council. Acts 1857, §§ 66, 67, p. 63. When either of these things is done, there is a contract in writing; and such contract is a necessary paper in the proceedings resulting in a street improvement.

Now, the charter provides that when an appeal is taken from a precept, "The clerk shall, upon the filing of said bond, forthwith make out and certify, under his hand and official seal, a full, true, and complete copy of all papers connected in any way with the said street improvement, beginning with the order of the council directing the work to be done and contracted for, and including all notices, precepts, orders of council, bonds and other papers filed in said matter; which transcript shall be in the nature of a complaint, and to which the appellant shall answer upon rule." Acts 1859, § 69, p. 215. From this provision it is

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1861.

WATHEN
v.
FARE.

manifest, that a transcript containing no copy of a contract for the street improvement in question, in a given case, would not show a *prima facie* liability on the part of any defendant to a precept, and would not constitute a sufficient complaint for the foundation of an action. In this case, as we have seen, the transcript contains a copy of the contract; and we think final assessments sufficiently appear to have been made by the council. See *The City of Indianapolis v. Imberry*, *ante*, p. 175. The minutes of the council showed that the engineer had been directed to make estimates, and that the council had accepted the work as being completed according to contract. The estimates, when made, were not noted, nor were the orders requiring their payment, on the minutes of the council, at the respective times when the acts and deeds occurred. But the council, having discovered the omission, supplied the defects by a preamble and resolutions, setting forth a minute history of all the steps that were taken, &c.; which were adopted and entered of record, a proper time before the issuing of the precept, &c. See *The People v. Zeyst*, 23 N. Y. Rep., (Ct. of App.,) p. 140. We think there should be another trial of the cause. *The City of Indianapolis v. Imberry*, *supra*.

Per Curiam.—The judgment below is reversed, with costs. Cause remanded, &c.

D. D. Pratt and Baldwin, for the appellant.

D. D. Dykernan and G. W. Blakemore, for the appellee.

WATHEN and Another v. FARE.

Suit upon a promissory note for \$104.50. Answer: 1. Payment. 2. A counter claim to the amount of \$15. The Court found for the defendant, on his counter claim, and also that he was entitled to a credit of \$30, paid before suit, and another credit of a like amount, paid after the commencement of the suit, leaving due to the plaintiff, \$33.07, for which he had judgment. Motion by the defendant to tax the costs against the plaintiff.

Held, that the plaintiff's claim having been reduced below \$50 by proof of payments, the motion should have been sustained, the statute, (2 R. S., § 397, p. 126,) not making any distinction between payments made before and after suit.

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1861.

WATHEN
v.
FARE.

APPEAL from the *Davies* Common Pleas.

Monday,
December 9.

DAVISON, J.—The appellee, who was the plaintiff, sued the appellants, who were the defendants, upon a promissory note for the payment of \$104.50. The note was payable to one *Matthew Shanahan*, who, without indorsement, assigned it to the plaintiff. *Shanahan* was made a defendant to answer as to the assignment, and having failed to appear was defaulted. The other defendants, *Joshua* and *Raphael Wathen*, answered: 1. By a denial. 2. Payment. 3. That the note in suit was executed to *Shanahan* for the consideration of a certain mare, at the time of its execution purchased of him by the defendants. And the defendants aver that at that time, *Shanahan* represented said mare to be in foal; and it was then and there expressly agreed, that if the mare should not prove to be in foal, and not bring a colt during the *Spring* then next ensuing, there should, in that event, be fifteen dollars deducted from the note. And the defendants, in fact, say, that said mare, when the note was executed, was not in foal, and did not bring a colt during said *Spring*, wherefore, &c. Replies in denial of the second and third paragraphs. The issues were submitted to the Court, who found that the defendants were entitled to a deduction of fifteen dollars from the principal of the note sued on, as alleged in the third paragraph of the defendants' answer; that they were also entitled to a credit of \$30, paid, *October 8, 1859*; and further, that they were entitled to a credit of \$30, paid *September 4, 1860*, after the commencement of this suit; which leaves now due on said note, and unpaid, \$33.07. For which sum the Court, having refused a new trial, rendered judgment.

At the proper time, the defendants moved to tax the costs of the suit against the plaintiff, but their motion was overruled, and they excepted. This ruling involves the only question in the case. We have a statute which says: "In actions for money demands on contract, commenced in the

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1861.

WATHEN
v.
FARE.

Circuit or Common Pleas Courts, if the plaintiff recovers less than fifty dollars, exclusive of costs, he shall pay costs, unless the judgment has been reduced below fifty dollars by a set-off or counter claim, pleaded and proved by the defendant; in which case, the party recovering judgment shall recover costs. When the judgment is reduced below fifty dollars by proof of payments, the defendant shall recover costs." 2 R. S., § 397, p. 126. As has been seen, the recovery in the lower Court was for \$33; hence, it is insisted, that the motion to tax the costs against the plaintiff should have been sustained. This position, in view of the facts upon which the motion is based, seems to be correct. True, the fifteen dollars allowed by the Court in reduction of the plaintiff's claim can not be considered in determining the question before us, because that sum, as pleaded and proved, was, in effect, a counter claim. *Poag v. La Due*, 7 Ind. 675. But the record shows two direct payments on the note, each for thirty dollars, which, alone, reduce the note sued on, including interest, to a sum less than fifty dollars. One of these payments, it is true, appears to have been made after the suit was commenced; but the statute to which we have referred makes no distinction between payments made before or after suit; nor do we perceive any valid reason why such distinction should exist. The result is, the judgment having been reduced by payments below fifty dollars, the plaintiff is liable for costs.

Per Curiam.—The judgment against the defendants for costs is reversed, and the Common Pleas Court is directed to render a judgment in favor of the defendants, and against the plaintiff, for costs of suit. The residue of the judgment below is affirmed. Costs in this Court against the appellee.

J. W. Burton, for the appellants.

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1861.

ROGERS v. SMITH.

ROGERS	17	323
v.	145	290
SMITH.		

For a tort committed upon a wife, two actions will lie, as a general rule; one by the husband alone, for the loss of service, expenses, &c., and the other by the husband and wife for the injury to the person.

So also for an injury to a child; the father may maintain an action for loss of service, expenses, &c., while the right of action for the personal injury is in the child.

The complaint for such injuries should be framed for the particular cause of action the party has a right to sue for, but where it is drawn so as to include both, it will be presumed, after verdict, that the proof was limited on the trial to the legitimate ground of damages.

Under the code, the joinder of both grounds of action would be duplicity, which should be taken advantage of by motion to strike out, not by demurrer.

APPEAL from the *Putnam* Common Pleas.Monday,
December 9.

PERKINS, J.—*Smith* sued *Rogers* for malicious prosecution.

The complaint contained three paragraphs: 1. Charging a malicious prosecution of himself. 2. Charging a malicious prosecution of his wife, whereby she was imprisoned, &c. 3. Charging a malicious prosecution of his minor children, &c. The plaintiff recovered seventy-six dollars. The Court overruled a demurrer to the second count, and that ruling raises the only question this Court has to decide.

The appellant contends that as to the matter of that paragraph, the wife was a necessary party plaintiff, with her husband, she being the meritorious cause of action. As to the personal injury to herself, her sufferings, &c., occasioned by the prosecution, she was the meritorious cause of action; and in a suit to recover damages on such account, it would be necessary that she should join with her husband. But, as to the loss of service of the wife, and the loss of comfort in her society, and the expenses attendant upon her defense, &c., she had no cause of action; the injury was to the husband alone; and for such cause of action the husband should sue alone. So, in relation to the minor children. For the loss of service, the father had his action; for the personal injury to the minors, severally, the action belonged to them. For torts, therefore, to wives and minor

Nov. Term, 1861. children, there are, as a general proposition, two actions; one by the husband and father, not for the injury to the person, but for his personal losses in the way of service, expenses, &c.; the other by the husband and wife for the injury to the person of the wife; and by the children severally, alone, for injury to their persons. *Long v. Morrison*, 14 Ind. 595; *The Ohio &c. Co. v. Tindall*, 13 id. 366; *Boyd v. Blaisdell*, 15 id. 73.

ROGERS
v.
SMITH.

In actions for criminal conversation, the husband must sue alone; and also in slander for words spoken of the wife, not actionable *per se*, but which occasion damage to the husband. 1 Swan's Prac., p. 88; *Van Vacter v. McKillip*, 7 Blackf. 578. And in these several suits the complaint should be framed for the particular cause of action the party has a right to sue for; but where it is drawn including both the causes of action of which we have spoken, it will be presumed, after verdict, that the proof was limited on the trial to the legitimate ground of damages. This is the common law doctrine. *Richards v. Farnham*, 13 Pick. 451; *Lewis et ux. v. Babcock*, 18 Johns. 443; *Fuller et ux. v. The Naugatuck Railroad Co.*, 21 Conn. 556. Under the code, the joinings of both grounds of action would be duplicity, which should be taken advantage of by motion to strike out, not by demurrer.

It may be remarked here, that a husband can not maintain a separate action for loss of services, &c., of his wife, growing out of an injury occasioned by a defective highway, in *Massachusetts*, because it is there held that all remedy for such injury is statutory, and the statute has given but the joint action by husband and wife. *Harwood v. The City of Lowell*, 4 Cush. 310; 2 Hilliard on Torts, p. 586.

Per Curiam.—The judgment is affirmed, with 1 per cent. damages and costs.

John A. Matson and *J. A. Scott*, for the appellant.

Williamson and *Daggy*, for the appellee.

RINGLE v. BICKLE.

Nov. Term,
1861.RINGLE
v.
BICKLE.

Where a defendant appears and pleads in bar of the action, he can not afterward object to the jurisdiction of the Court over his person.

APPEAL from the *Noble* Circuit Court.

Monday,
December 9.

WORDEN, J.—Suit by *Bickle* against *Ringle*, upon the transcript of a judgment recovered by the plaintiff against the defendant, in the Court of Common Pleas of *Licking* county, in the State of *Ohio*. Issue; trial by jury, and verdict and judgment for the plaintiff.

The ground relied upon for a reversal of the judgment is, that the evidence is not sufficient to sustain the verdict. The transcript set out in the complaint, and offered in evidence, appears on its face sufficient; but in answer to interrogatories, the plaintiff admitted that for one year preceding the commencement of the suit in *Ohio*, the defendant did not reside in the county of *Licking*, and State of *Ohio*, and that he, the plaintiff, procured the sheriff to return the writ served, by "covin" with the sheriff. The writ was returned served, "by leaving a certified copy thereof at the usual place of residence of the said *Peter Ringle*." It is insisted that the judgment, in consequence of the facts thus admitted, was a nullity.

The defendant appeared and pleaded in bar of the action in *Ohio*, and this gave the Court jurisdiction over his person, if it was not otherwise acquired, and was a waiver of all defects in the process or manner of serving it.

The defendant having appeared and pleaded in bar, could not, in the suit in *Ohio*, have objected to the jurisdiction of the Court over his person; neither can he, *a fortiori*, in an action upon a judgment thus rendered against him.

Per Curiam.—The judgment is affirmed, with 2 per cent. damages and costs.

M. Jenkinson, for the appellant,

W. H. Coombs, for the appellee.

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1861.

JENKS
v.
LIMA
TOWNSHIP.

Monday,
December 9.

ADAMS and Others v. DREXEL and Others.

APPEAL from the *Marion* Circuit Court.

Per Curiam.—Judgment by confession, taken by the appellees against the appellants, upon promissory notes.

The objections are: *First*, That the judgment is for too large an amount; and, *Second*, That the judgment should have been several, and not joint.

There may have been a slight error in the computation, but perhaps not of sufficient magnitude to authorize a reversal, even had an application been made in the Court below to correct the error, which was not done.

The joint judgment was right, as the notes were the joint notes of the appellants.

The judgment is affirmed, with 5 per cent. damages and costs.

K. Ferguson, for the appellants.

F. Rand, for the appellees.

JENKS v. LIMA TOWNSHIP.

Suit before a justice of the peace, against *Lima* township, alleging that in 1853, the proposition was submitted to the voters of said township to assess a special tax for common school purposes; that said proposition was carried, and a tax assessed, which amounted on plaintiff's property to eighty dollars; that said tax was placed upon the tax duplicate, and collected by the county treasurer, and paid over to the township; that said tax was illegal, &c.

Held, that though the complaint would not have been sufficiently certain, if the suit had been begun in the Circuit or Common Pleas Court, yet it was good before a justice.

Held, also, that an illegal tax, voluntarily paid, can not be recovered back; and the payment is regarded as voluntary, unless it be made to the officer to procure the release of person or property from his power; and

protest at the time of payment, in connection with other circumstances, may be evidence that the payment was made for such a purpose.

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1861.

APPEAL from the *Lagrange* Circuit Court.

JENKS
v.
LIMA
TOWNSHIP.

PERKINS, J.—The plaintiff filed the following complaint with a justice of the peace:

"Nathan Jenks complains of *Lima* township, in the county of *Lagrange*, and State of *Indiana*, and says, that at a special election in said township, on the — day of —, 1853, the proposition was submitted to the voters of said township, to assess a special tax upon the tax payers of said township, for common school purposes therein; that they voted in favor of such assessment, and the trustees thereupon assessed, or caused to be assessed, the sum of thirty cents on each hundred dollars of valuation of property therein, and fifty cents poll tax; that the plaintiff's tax, in consequence of said assessment, was eighty dollars; that the same was placed upon the duplicate of taxes for said county, and delivered to the treasurer thereof, to be collected; and that the treasurer collected the same, and paid it over to the township. The plaintiff, also, says that such vote, levy and assessment of said special tax, was erroneous, illegal, unconstitutional and void; and that he suffered damages, in consequence thereof, to the amount of eighty dollars, for which sum he demands judgment, and other proper relief.

Monday,
December 9.

"JAMES M. FLAGG, Attorney for Plaintiff."

The tax described in the complaint was illegal. *The City of Lafayette v. Jenners*, 10 Ind. 70. On appeal to the Circuit Court, the cause was dismissed for want of a sufficient complaint.

We think the Court erred in dismissing the cause. The complaint would not have been sufficiently certain, had the suit been commenced in the Circuit or Common Pleas Court, in showing that the tax had been forcibly collected; but, according to immemorial usage in this State, we think a forcible collection might have been proved under the complaint, and that it is sufficiently certain, being in an action commenced before a justice of the peace.

An illegal tax, voluntarily paid, can not be recovered back;

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1861.

HARLAN
v.
HARRIS.

and the payment is regarded as voluntary, unless it be made to procure the release of person or property from the power of the officer; and protest, at the time of payment, in connection with other circumstances, may be evidence that the payment is made for such purpose. This is the rule in *England*. *Oates v. Hudson*, 5 Eng. L. & E. Rep. 469, and note. It is the rule in *New York*. *Silliman v. Wing*, 7 Hill. 159; *Fleetwood v. The City of New York*, 2 Sandf. 475. It is the rule in *Pennsylvania*. *The Borough of Allentown v. Saeger*, 20 Penn. St. Rep. 421. It is the rule in *Ohio*. *Mays v. The City of Cincinnati*, 1 Ohio St. Rep. 268. It is the rule in *Maine*. *Smith v. The Inhabitants, &c.*, 27 Maine, 145. It is the rule in *Massachusetts*. *The Boston, &c. Co. v. Boston*, 4 Met. 181. It is the rule in other States, as shown by citations in the cases above cited. It is the rule in the Supreme Court of the *United States*. *Elliott v. Swartwout*, 10 Peters, 137.

Per Curiam.—The judgment is reversed, with costs. Cause remanded, &c.

J. M. Flagg, for the appellant.

A. Ellison, for the appellee.

HARLAN and Another v. HARRIS.

Monday,
December 9.

APPEAL from the *Grant* Circuit Court.

WORDEN, J.—Suit by *Harris* as holder, against the appellants as indorsers, of certain promissory notes. Issue; trial, finding and judgment for the plaintiff.

On the trial, it became material for the plaintiff to prove, in order to show the insolvency of *John Shirley*, the maker of the notes, that a certain piece of land owned by him, and mortgaged to secure the payment of the notes, had been sold on execution against him. This the Court permitted, over the objection of the defendants, on the ground that the

evidence was secondary, to be proved by parol. A new trial was asked on this ground. Nov. Term,
1861.

We think the Court erred in admitting parol evidence to prove such sale. The judgment, execution and return thereon, or a transcript thereof, and the sheriff's deed, were primary evidence, and should have been produced, or their absence accounted for.

KOUNTZ
v.
HART.

Per Curiam.—The judgment is reversed, with costs. Cause remanded, &c.

H. S. Kelley, for the appellants.

J. H. Jones, for the appellee.

KOUNTZ v. HART.

A. having a mare in the possession of *B.*, which *C.* desired to purchase, agreed to sell her to *C.* for \$70, if he would give his note therefor, payable at a given time, with such surety thereon as *B.* would approve. *C.* offered to *B.* a note with surety, but which did not bear interest, nor waive the benefit of the valuation laws. Upon objection being made to these defects, *C.* took a pen and wrote in the note the words, "with interest," and then agreed that he would take the mare, and if *A.* was not satisfied with the note, when he should see it, he would return the mare to him. *A.* declined to receive the note, and having demanded of *C.* to return the mare, brought this suit to recover her.

Held, that the alteration of the note by the insertion of the words, "with interest," without the consent of the surety, discharged him from any liability thereon, and left the note without surety, and hence not such a one as the contract called for.

Held, also, that the title to the mare never passed to *C.*

APPEAL from the *Huntington* Common Pleas.

*Monday,
December 9.*

WORDEN, J.—This was an action of replevin for a mare, brought before a justice of the peace, by *Kountz*, as guardian of *Isaac Leedy*, an insane person, against *Hart*. The plaintiff appealed to the Court of Common Pleas, where there was a verdict and judgment for the defendant.

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1861.

KOUNTZ
V.
HART.

The case is before us on the evidence. The following are the substantial facts, as gathered from the evidence. The mare in question belonged to *Isaac Leedy*, the plaintiff's ward, and had been left by his wife in the possession of one *Abraham Leedy*. *Hart* wished to purchase her. *Hart* and *Abraham Leedy* went to see the plaintiff about it, and it was agreed between the plaintiff and defendant that the plaintiff would sell the mare to the defendant for \$70, payable on *October 1, 1859*, for which amount *Hart* was to execute his note to the plaintiff, with interest from date, (this was about *February 1, 1859*,) with good security, and the note was to be such as *Abraham Leedy* should approve. *Hart* and *Abraham Leedy* then left. In a few days *Hart* brought to *Abraham Leedy* a promissory note, made payable to the plaintiff, for the amount, payable at the time specified, signed by the defendant and one *John Mininker*. The note did not waive the appraisement laws, nor did it bear interest. *Abraham Leedy* refused to take the note because it did not waive the appraisement laws, unless *Hart* would satisfy *Kountz*. *Hart* then said he would make it draw interest from date, and procured pen and ink, and interlined, or wrote on the face of the note, the words, "with interest from date." He then said if *Kountz*, when he returned home, was not satisfied with the note, he would return the mare in as good condition as she was then in. With this understanding *Leedy* took the note and let the defendant have the mare. In a week or two *Kountz* came home, and *Leedy* presented to him the note, and informed him of what had transpired. *Kountz* refused to receive the note, saying that the surety was not bound for the interest, and he would not take it; that *Hart* must execute another note, with surety, or give up the mare. The plaintiff immediately prepared a note to be executed by *Hart* and his surety, according to the terms of the contract, waiving appraisement laws, and sent it, together with the other note, to the defendant, requesting him to execute, with his surety, the new note, or return the mare. The defendant declined to execute the new note, because it waived the appraisement laws, but agreed to return the mare, stating that he had agreed to return her in as good

condition as when he got her; that she was then a little lame, and he would keep her a few days until she got well, and would return her some day that week, which, however, was not done. A subsequent demand was also made for a return of the mare, which was not complied with.

Upon these facts, concerning which the evidence does not appear to be at all conflicting, it is difficult to see upon what ground the verdict and judgment can be sustained. Admitting that *Hart* was not required, by the terms of the contract, to execute a note waiving appraisement laws; still he has fallen far short of complying with it in another respect. When the alteration was made in the note, by inserting the words "with interest from date," the surety upon the note was not present, and no authority appears for such alteration. The alteration changed the substance of the contract, and, undoubtedly discharged the surety from all liability thereon. *Holland v. Hatch*, 11 Ind. 497.

The note then stood simply as the note of the defendant, without surety. *Abraham Leedy* was not authorized, in any manner, to take a note without surety, but *with* such surety as he should approve. Again, the defendant agreed, upon receiving possession of the mare, to return her unless the note should be accepted by the plaintiff.

It is clear to our minds, that the title to the mare never passed to the defendant; and, therefore, that a new trial should have been granted.

The appellee assigns cross errors upon the ruling of the Court upon motions made by him to dismiss the appeal, and to correct the record. These several motions were based upon affidavits which are not in the record; and therefore we must presume that the rulings were correct. The affidavits, to be sure, are copied by the clerk into the transcript, but that does not make them a part of the record; which can only be done by bill of exceptions, or order of the Court. *Kirby v. Cannon*, 9 Ind. 371.

Per Curiam.—The judgment is reversed, with costs. Cause remanded for a new trial.

D. O. Daily, for the appellee.

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KOUNTZ
v.
HART.

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1861.

POPHAM *v.* ROBINSON.

ROYAL
v.
BAER.

Monday,
December 9.

APPEAL from the *Kosciusko* Circuit Court.

Per Curiam.—There was a trial and judgment for the plaintiff on *January 3*, 1860. No time appears to have been given for the preparation, &c., of a bill of exceptions; one was filed on *February 27*, 1860. It is not properly a part of the record, and consequently there is no point before us, by the exceptions thus attempted to be presented.

The judgment is affirmed, with 10 per cent. damages and costs.

H. C. Newcomb and *J. Tarkington*, for the appellant.

ROYAL *v.* BAER.

Where an order of reference does not require the referee to report to the Court the facts found by him, he has no authority to report them, and there is nothing before the Court upon which to base exceptions to the findings of the referee on the evidence.

Monday,
December 9.

APPEAL from the *Tippecanoe* Circuit Court.

DAVISON, J.—*Baer*, who was the plaintiff, sued *Royal* upon an agreement in writing, as follows:

“Article of agreement between *John Roya*’, of the first part, and *Jacob Baer*, of the second part, witnesseth: The party of the second part agrees to do the mason work for a brick house, for the party of the first part, *in a workmanlike manner*, and furnish all the materials and hands for doing the same, (plastering not included.) The party of the first part agrees to pay the party of the second part, for the said work and materials, eight dollars per thousand, to be measured in the wall, twenty-two brick to the foot, windows, doors, and sash openings included in the measure; and also agrees to haul the brick from the kiln in *Dayton*, to the house; also agrees that five hundred and fifty dollars, the

probable cost of the brick, is now due and drawing interest. The party of the first part further agrees to pay to the party of the second part, while the work is progressing, sufficient to pay hands and boarding, and to pay for all the work when the house is done.

Nov. Term,
1861.

ROYAL
v.
BAER.

"In witness whereof we have hereunto set our names, this 10th of *September*, 1857.

(Signed) "JOHN ROYAL,
"JACOB BAER."

Plaintiff, in his complaint, avers that he has performed all the stipulations in the agreement, to be done by him, viz., that he has done the mason work for said brick house, entire, being 218,225 bricks, at eight dollars per thousand, amounting to \$1,745, for said work, \$550 of which should draw interest, per contract, since *September* 10, 1857. But plaintiff, in fact, says that defendant has failed to perform the stipulations on his part to be performed, in this: 1. He has failed to pay said \$550, made due by contract. 2. He neglected to haul the bricks from the kiln at *Dayton* to said house, and thereby, and otherwise, delayed the plaintiff in the prosecution of the work for eighteen days, to his damage \$90. 3. Upon the completion of the work, the same was, by agreement of the parties, measured in the wall, in accordance with the agreement, and amounted to 218,225 bricks, making, at eight dollars per thousand, \$1,745, which was not paid on the completion of the work, &c. There is a second count of the complaint, which alleges that defendant is indebted to plaintiff \$1,745, for work done and materials furnished in the construction of a brick house for the defendant, &c. Wherefore the plaintiff demands judgment, &c.

Defendant answered: 1. By a denial. 2. That he performed all and singular the duties required of him by said agreement, but he denies that the plaintiff did the like on his part; and defendant, in fact, says that plaintiff failed to perform said work in a workmanlike manner, by reason whereof he, defendant, has been damaged \$1,500, &c. 3. That plaintiff is indebted to defendant upon an account, the items of which are set forth, amounting in the aggregate to \$2,829, which he offers to set-off, and prays judgment for the

Nov. Term, 1861. excess, &c. Replies in denial of the second and third paragraphs of the answer.

ROYAL
v.
BAER.

The record shows that the issues having been completed, the cause was, by agreement, referred for trial to *Robert C. Gregory*, an attorney of that Court, as referee, and that he should report at the next term, &c.

After this, at the *October* term, 1858, the referee made his report, which, after referring to certain evidence and commenting thereon, concludes thus:

"I state the account between the parties as follows:

"172,230 bricks in the wall, at \$6.50 per M...	\$1,119.49
3,500 bricks furnished to complete the wall,	
at \$5.50 per M.....	19.25
	<hr/>
	\$1,138.74

DEDUCT

Order to Carter,.....	\$275.00
Cash paid Baer,.....	126.75
Cash paid hands,.....	140.00
Order to Favoute,.....	28.75
" " Dryer,.....	6.50
" " Pedan,.....	34.18
14½ weeks' board, at \$1.75,.....	26.81
Thomas Royal's account,.....	196.42
	<hr/>
	\$833.44
	<hr/>
	\$305.30

"So I find for the plaintiff, and assess his damages at three hundred and five dollars and thirty cents, that being the amount I find due and owing from the defendant to the plaintiff, for, and on account of, the matters referred to me by order of this Court.

"August 27, 1858. "ROBERT C. GREGORY." [SEAL.]

To this report the defendant excepted, as follows: 1. The finding is unsustained by the evidence, and is based upon an erroneous consideration of the evidence. 2. The finding and report show that the defendant has not been allowed the full amount of his just damages as proved by the evidence. 3. The finding and report show that there was an

error in the assessment of the amount of the recovery; the same being too large, and the report showing that, from the evidence, the plaintiff was entitled to no damages." The Court overruled the exceptions, and, having refused a new trial, rendered judgment upon the finding, &c.

Nov. Term,
1861.

COLERICK
v.
TOWNLEY.

We have given the conclusion of the report, but have not copied it entire in this opinion. It is enough for the consideration of this case, that the referee has not reported the facts proved; nor was he required to do so by the order of reference. And this being the case, there is nothing before us upon which to base an opinion, whether the exceptions to the report were, or not, well taken. There is, indeed, but one way of bringing such facts before the Court, viz., "by requiring the referee to report the facts found and the conclusions of law separately, and then, upon exceptions taken, the Court will review the decision of the referee, as it would its own proceedings on motion for a new trial." *The Indiana, &c. Railway Co. v. Bradley*, 7 Ind. 49; *Trustees, &c. v. Huston*, 12 *id.* 276; *Ware v. Adams*, *id.* 359; *Thornburgh v. Ollman*, at the present term. In this instance, the facts are not reported; but if they were, they could not be deemed legitimately before the Court, because the order of reference gave the referee no authority to report them.

Per Curiam.—The judgment is affirmed, with 5 per cent. damages and costs.

G. S. Orth and *J. A. Stein*, for the appellant.

W. C. Wilson and *Geo. Gardner*, for the appellee.

COLERICK and Another v. TOWNLEY.

APPEAL from the *Allen* Common Pleas.

Monday,
December 9.

HANNA, J.—Complaint to recover judgment on a note, and to foreclose a mortgage. Default; submitted "on complaint, exhibits, default and proof." Finding for the plaintiff.

Nov. Term, Judgment for amount of note, &c., against *Colerick*, and
 1861. against *Colerick* and wife for foreclosure, &c., and that
 MARTIN the property be sold as other property is sold on execu-
 V. tion, &c.
 STANFIELD.

It is objected that there should have been proof against the married woman; that there should not have been a personal judgment against her, and that so much only as was necessary to satisfy the sum found due, of the mortgaged property, should have been ordered to be sold.

The evidence is not in the record, and as the record shows proofs were introduced, we must presume in favor of the action of the Court upon the first and third error, even if the form of the judgment is wrong, which we need not notice. There was no personal judgment against the wife; and as to whether, under the notice, by the summons appearing in the case, a personal judgment should have been rendered against *Colerick* we can not inquire. There was no motion as to the default.

Per Curiam.—The appeal is dismissed, at the appellants' costs.

R. Brackenridge, M. Jenkinson and E. T. Colerick, for the appellants.

MARTIN v. STANFIELD.

Where an illegal tax has been voluntarily paid by the tax payer, under a mistake of law, it can not be recovered back.

Monday,
 December 9.

APPEAL from the *Tippecanoe* Common Pleas.

Per Curiam.—In this case the appellee, the plaintiff below, had judgment against the appellant upon the following facts, agreed upon, namely:

"In May 1853, a special meeting of the voters of *Wabas* township, of said county, was duly held, and a tax of fifty cents on the hundred dollars of taxable property was voted, for the purpose of building school houses, and continuing

schools after the public funds should have been exhausted, and to defray the general expenses of such schools, as provided for in § 130 of an 'Act to provide for a general and uniform system of common schools, &c., approved *June 14, 1852.*' The plaintiff was a resident of said township at the time, the owner of property therein, and was assessed and taxed the sum of twenty-one dollars and seventy cents, under and by virtue of said vote. In *December, 1853*, said plaintiff called at the office of said defendant, then and still the treasurer of said county, and paid to him said tax with his other taxes, they at the time supposing the same to be legal. The said sum of twenty-one dollars, seventy cents, is still in the hands of said *Martin*, as such treasurer, and has been demanded by said plaintiff, and payment thereof refused by the defendant."

Nov. Term,
1861.

SWAILS
v.
COVERDILL.

The error assigned is, that the judgment is erroneous, because the payment was voluntary.

That the tax was improperly assessed, has been decided in the case of *Greencastle Township v. Black*, 5 Ind. 557, and being improperly assessed, the treasurer could have been enjoined from collecting it. *Id.* But as it was voluntarily paid, though under a mistake of law, it can not be recovered back. *Snelson v. The Board, &c.*, 16 Ind. 29; *Bond v. Coats*, *id.* 203; *Jenks v. Lima Township*, *ante*, p. 326.

The judgment is reversed, with costs. Cause remanded, &c.
H. W. Chase and *J. A. Wilstach*, for the appellant.
John Stanfield, for the appellee.

SWAILS v. COVERDILL.

One partner may assign his interest in an open account due the firm, to his co-partner, so as to enable the latter to maintain an action thereon in his own name.

The assignor of an account must, in an action thereon by his assignee, be

Nov. Term,
1861.

SWAILS
v.

COVERDILL.

Monday.
December 9.

made a defendant to answer as to his interest; but the mere fact of naming him as a defendant, does not make him "an adverse party," nor is he a competent witness for the plaintiff to prove the account.

APPEAL from the *Decatur* Common Pleas.

HANNA, J.—*Coverdill* sued *Swails* upon an open account, and joined *Gavin* as a defendant, averring that *Coverdill* and *Gavin*, as law partners, had been employed by *Swail's* to defend, and did defend, him upon a charge, &c.; that their services were reasonably worth five hundred dollars; that afterward the partnership was dissolved, and the interest of said *Gavin* in said claim was by him assigned to said *Coverdill*.

A demurrer to the complaint was overruled. The question presented upon this ruling is, whether one partner can assign his interest in an open account due the firm, to his co-partner; and if yea, whether a complaint by the assignee alone, is good, without an averment that the partnership affairs were settled, &c.? We are inclined to the opinion that, under such circumstances, one partner might become the real party in interest, so as to maintain a suit in his own name upon a claim.

Gavin answered that he had no interest, &c. *Swails* answered, admitting the employment, but averring that by special contract with *Gavin*, the firm were to defend him for the sum of twenty-five dollars, which he had tendered, &c. Reply in denial. Trial, and judgment for the plaintiff.

Upon the trial, the plaintiff offered *Gavin* as a witness, who was, over the objection of the defendant, admitted to testify as to the employment, the service, and the value thereof, and to disprove the special contract pleaded.

Our statutes bearing upon the question are, that the real party in interest must sue (2 R. S., p. 27); that all persons having an interest in the subject of the action, and in obtaining the relief demanded, shall be joined as plaintiffs, except, &c., and that interest shall not disqualify; but this section shall not render competent a party to an action, &c. (2 R. S., § 238, p. 80); that where a claim arising out of contract is assigned, but not in writing, the assignor shall be

made a defendant, to answer as to the assignment and his interest, &c. *Id.* 28. That any person may be made a defendant who has, or claims, an interest in the controversy, adverse to the plaintiff, or who is a necessary party to a complete determination, or settlement, of the questions involved. *Id.* § 18, p. 31. That a party to an action may be examined as a witness, at the instance of the adverse party, &c. *Id.* p. 96.

Nov. Term,
1861.

SWAILS
V.
COVERDILL.

Under these statutes it is manifest that upon the assignment of an account, the assignor is a necessary party, either as a plaintiff or defendant. We are of opinion that he should be made a party defendant, and not plaintiff, as contended by appellant.

Gavin being thus a necessary party, the next question is, whether he was a competent witness as to the points upon which he was permitted to testify. It has been held that a party so situated was not competent. *Cox v. Davis*, 16 Ind. 378. To what was said in that case we might add, that the statute quoted, (2 R. S., § 295, p. 96,) appears to exclude the idea that a party to the record can be a witness, unless he is adverse to the party who may offer to introduce him. If he is a necessary party, as in this instance, (16 Ind. *supra*,) he can not be a witness if he should disclaim having any interest in the event of the suit; for, occupying that position does not show *that* adverse position which the statute contemplates. Indeed; if true, it shows the absence of any interest, of any adversary position. As was said in *Swift v. Ellsworth*, 10 Ind. 295, merely naming a person as an opposing party does not necessarily, and of course, make him an adverse party during the progress of the case. The evidence of *Gavin* having been thus improperly received, the judgment must be reversed.

Per Curiam.—The judgment is reversed, with costs. Cause remanded, &c.

B. W. Wilson, for the appellant.

Oscar B. Hord, for the appellee.

Nov. Term,
1861.

NELSON v. FUTRAL.

WEBB
v.

DEITCH.

Monday,
December 9.

APPEAL from the *Grant* Circuit Court.

Per Curiam.—This was an action by *Nelson*, as assignee of a promissory note, against *Futral*, the assignor. The issues were submitted to the Court, who found for the defendant, and, having refused a new trial, rendered judgment, &c. The causes assigned for a new trial relate to the insufficiency of the evidence to sustain the finding. The evidence given upon the trial is set out in the record. We have examined it carefully, and though it is, to some extent, conflicting, we are of opinion that its weight accords with the finding of the Court.

The judgment is affirmed, with costs.

J. H. Jones, Isaac VanDevanter and J. F. McDowell, for the appellant.

WEBB and Another v. DEITCH and Another.

Suit upon a promissory note for \$406. Answer, as to the whole cause of action, that \$100 of the consideration of the note was for usurious interest.

Held, that the answer was bad, for pleading in bar of the whole action, facts that were a bar, at most, only to the amount of \$100, and the interest and cost, and that the defect was reached by demurrer.

Monday,
December 9.

APPEAL from the *Johnson* Common Pleas.

WORDEN, J.—Suit by the appellees against the appellants upon a promissory note given by the defendants to the plaintiffs, for \$406.55.

The defendants answered, among other things, as follows, viz., "And for further answer, her in defendants say that they admit the execution of the note sued on, but say that \$100 of the consideration of the note was for usurious and illegal interest; wherefore defendants demand judgment."

A demurrer was sustained to this paragraph of the answer, and this ruling is the only error complained of.

We need not decide whether the objection to the answer, that it does not set out the usurious contract, or allege the facts constituting the usury, can be reached by demurrer. The answer is radically defective in another particular. It sets up matter which, at most, could only be a bar to \$100, and the interest and costs, in bar of the entire note. This is bad pleading, and the defect is reached, under the code, by demurrer. *Brown v. Perry*, 14 Ind. 32, and cases there cited.

Per Curiam.—The judgment is affirmed, with 5 per cent. damages and costs.

T. W. Woollen and *C. F. McNutt*, for the appellants.

Overstreet and *Hunter* for the appellees.

Nov. Term,
1861.

THE BOARD
OF COMMISSIONERS, &c.
v.
ROGERS.

THE BOARD OF COMMISSIONERS OF JEFFERSON COUNTY v. ROGERS.

Section 24 of the act for the relief of the poor, (1 R. S. 1852, p. 405,) authorizes relief to be granted to persons, not inhabitants of the township, who may be found lying sick therein, or in distress, without friends or money, and renders the county liable therefor.

Section 8 of the act to limit allowances, &c., (1 R. S. 1852, p. 101,) which provides for the employment by the county board of one or more physicians to attend upon the poor, has reference only to such poor as are settled in the county, and does not include strangers entitled to temporary relief; and hence the overseer of the poor may employ another physician to attend upon such strangers, and the county will be liable therefor.

APPEAL from the *Jefferson* Common Pleas.

WORDEN, J.—*Rogers* laid a claim before the *Board of Commissioners* for medical services, which being disallowed by the board, he appealed to the Court of Common Pleas, where, upon trial by the Court, he recovered.

The board appealing here, the case is before us on the evidence.

Monday,
December 9.

Nov. Term,
1861.

THE BOARD
OF COMMISSIONERS, &C.
V.
ROGERS.

It appears that a stranger, having no residence in *Jefferson* county, and without money, friends, or shelter, found himself in that county sick with the small pox. In this condition he was taken by a citizen to *John E. Moore*, trustee and overseer of the poor for *Madison* township. *Moore* furnished him a shelter, and, as such overseer, employed the plaintiff as a physician to attend upon and administer to him. For the services thus rendered this suit is brought.

The ground of defense is, that at that time the *Board of Commissioners* had an existing contract with two other physicians to attend to all cases of sickness in the county jail and county poor house, requiring medical aid, and to attend to the sick poor persons of *Madison* township generally.

There can be no doubt that § 24 of the act for the relief of the poor, (1 R. S. 1852, p. 405,) authorizes such relief to be granted, and renders the county liable therefor. *Board of Commissioners of Huntington County v. Boyle*, 9 Ind. 296. The question is, whether the overseer was obliged to apply to the physicians thus employed by the *Board of Commissioners*, or whether he might lawfully employ another.

This depends upon the construction that shall be given to § 8 of an act to authorize and limit allowances, &c., (1 R. S. 1852, p. 101,) taken in connection with the poor law. That section makes it the duty of the board "to contract with one or more skillful physicians, having knowledge of surgery; to attend upon all prisoners confined in jail, or paupers in the county asylum;" and provides that they "may also contract with physicians to attend upon the poor generally in the county; and no claim of a physician or surgeon for *such* services shall be allowed by the board, except in pursuance of the terms of such contract."

The act for the relief of the poor does not contemplate, as a general proposition, that any county shall be bound to provide for any paupers except those settled therein. Thus, § 5 provides how a settlement may be acquired. Section 10 provides for entering in the poor book of each township the names of all paupers therein. Section 14 provides for removing poor persons having no settlement "to the place where such persons belong." Section 11 provides

that if the overseers are unable to ascertain the last place of legal settlement of a pauper, he shall be provided for in the county where he may be found. Section 35 authorizes the county boards to levy a tax for the support of the poor of their respective counties. Section 24, the one first above cited, provides that "it shall be the duty of the overseers of the poor, on complaint made to them that any person, not an inhabitant of their township, is lying sick therein, or in distress, without friends or money, so that he or she is likely to suffer, to examine into the case of such person, and grant such temporary relief as the nature of the case may require." The section closes as follows: "And the board of county commissioners of the proper county, at any meeting of such board, shall examine all claims arising under the provisions of this section, and if found reasonable, shall direct the same to be audited and paid out of the county treasury."

Keeping in view the fact that each county provides for its own poor only, as a general proposition, and affords temporary relief to strangers, in the cases mentioned, as an exception, for which payment out of the county treasury is separately and specifically provided for, we have no doubt as to the construction which should be given to § 8 of the act on the subject of allowances, *supra*. The language, "may also contract with physicians to attend upon *the poor generally in the county*," evidently has reference to such poor as are settled in the county, or are entitled to be therein provided for, in accordance with the general theory that the county provides only for its own poor. It does not include strangers entitled to temporary relief, under § 24 of the poor act. This being the construction which we place upon the statutes, it follows that the physicians employed by the board were under no obligation to attend to this particular case of sickness, nor was the overseer under any obligation to call upon them, but might employ any other.

Per Curiam.—The judgment is affirmed, with costs.

J. Y. Allison, for the appellant.

M. G. Bright, for the appellee.

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1861.

THE BOARD
OF COMMISSIONERS, &c.
v.
ROGERS.

Nov. Term,

1861.

WING

v.

MIX.

Monday,
December 9.

QUICK and Another v. LAUREL TOWNSHIP and Another.

APPEAL from the *Franklin* Circuit Court.

Per Curiam.—The judgment in this case is reversed, for the reasons given in *Quick et al. v. Whitewater Township*, 7 Ind. 570, the questions arising in the record of each case being similar.

Judgment reversed, with costs.

HANNA, J., dissented.

J. Morrison, for the appellants.*Geo. Holland* and *J. D. Howland*, for the appellee.

WING, ADMINISTRATOR OF HALE v. MIX and Another.

A. sued the administrator with the will annexed of the estate of *B.*, alleging that she was the granddaughter of *B.*, and entitled under his will to a legacy of \$300; and that the defendant had in his hands large sums of money belonging to said estate, out of which said legacy might be paid, which he refused so to apply, &c. Answer: that *B.*, by his will, provided that his widow should have out of his estate a good, comfortable living; that on final settlement with the Court, he had in his hands the sum of \$718, which he was directed by the Probate Court to put at interest, and out of the interest, or from the principal, if necessary, to pay such sums as might be necessary for the comfortable support of the widow; that he had, in pursuance of said order, paid over large sums to the widow, &c. The will provided: "1. My will and desire is, that my wife have of my estate a good, comfortable living, during her natural life." "13. I mean to be understood in relation to my wife, that she have one third of all my estate, as the law provides, during her life," &c.

Held, that under the will, the widow was entitled for her support and maintenance, during her life, to one third of the estate, and no more, and hence the order of the Probate Court was unauthorized by the will.

Held, also, that the administrator should have applied the money in his hands at the time of the demand to the payment of *A.*'s legacy.

Monday,
December 9.APPEAL from the *Laporte* Common Pleas.

DAVISON, J.—*David* and *Hester Ann Mix* brought this action against *Wing*, as the administrator with the will

annexed, of the estate of *Silas Hale*, deceased, alleging in their complaint that *Hester Ann*, the wife of *David Mix*, is the granddaughter of the decedent, who died in the year 1844. That *Silas Hale*, prior to his death, viz., on *April 7*, 1842, made his will, whereby, among other things, he bequeathed to *Hester Ann*, \$300; that said will was duly admitted to probate; and that, on *October 11*, 1849, administration of the decedent's estate was duly committed to the defendant, who has received, and has now in his hands, large sums of money belonging to said estate, out of which the legacy of *Hester Ann* could and ought to be paid. It is averred that the defendant, although specially requested, has failed and refused to pay the legacy, or any part of it. Wherefore, &c.

Nov. Term,
1861.

WING
v.
MIX.

Defendant answered: 1. By denial. 2. Payment. 3. That by the will of *Silas Hale*, it was provided that *Eze Hale*, his widow, should have out of his estate, during her natural life, a good, comfortable living. That defendant, as administrator, &c., proceeded, under the direction of the Probate Court, to settle the estate, and at the *January* term, 1854, by his report, which was approved by the Court, it appeared that he had on hand, \$718; since which time he has received no other moneys belonging to the estate. And that the Court then and there, in pursuance of said will, ordered and directed that the defendant, as such administrator, should put, or hold, said money at interest, until the further order of said Court, and that out of the interest, or from the principal, if necessary, the defendant should, from time to time, pay such sums as should be necessary for the comfortable support of said widow; which order is in full force, &c., of which the plaintiffs had notice, &c. That the widow has no property or income, except her dower right in certain real estate, the income of which is wholly insufficient for her support; and that, for such support, the defendant has, from time to time, paid her large sums of money out of the moneys aforesaid; and that she is still living, and continues to require contributions for her comfortable support, &c. To this third paragraph, the Court sustained a demurrer, and the defendant excepted. Issues having been made, the cause was

Nov. Term, 1861. submitted to the Court, who found for the plaintiffs, and, having refused a new trial, rendered judgment, &c.

WING
v.
MEX.

The plaintiffs, upon the trial, gave in evidence the will referred to in the complaint, which contains these provisions:

"1. After the payment of my funeral expenses, and the expenses of my last sickness, my will and desire is, that my wife, *Eve Hale*, have of my estate, a good, comfortable living, during her natural life 9. To my granddaughter, *Hes'er Ann Hale*, and her heirs forever, I give and bequeath three hundred dollars 13. I mean to be understood, in relation to my wife, that she have one third of all my estate, as the law provides, during her life, and that the sale of my real estate be subject to her dower."

The plaintiffs produced one *Wilson*, who testified that *Hes'er Ann Hale*, named in the will, was the granddaughter of the testator, and the wife of *David Mix*, the plaintiff. They also proved a demand upon the defendant, prior to the commencement of this suit, for the legacy sued for in this action; and further, they gave in evidence the record of a final settlement of the estate, made by the defendant, as administrator, &c., whereby it appeared, that upon such settlement there remained in his hands, \$718.15. And thereupon the defendant offered in evidence the order of the Court referred to in the third paragraph of the answer, but his offer was refused. He then offered to prove that *Eve Hale's*, the widow's, entire interest from her dower, did not exceed \$50 per annum, and that it required, in addition, at least \$3 per week for her comfortable support, and also that he had paid large sums of money, in pursuance of said order of the Court; but this evidence was also excluded, and the defendant excepted.

The first and thirteenth clauses in the will evidently relate to each other, and may be construed as one provision; and this being done, it is manifest that the testator intended his widow to have, as her support and maintenance during life, one third of his estate, and no more; and, in consequence, the order of the Probate Court was unauthorized by the provisions of the will. Still, that order is in force, and so far as the administrator had, at the time of the demand for the

legacy, made payments under it, he might, perhaps, have defended in this action, but of this we give no opinion. It is, however, not doubtful that he was bound, notwithstanding the order, to apply the moneys of the estate in his hands, at the time of the demand, in payment of the legacy. Here, it is alleged and proved, that the defendant, upon settlement of the estate, stood liable for \$718, an amount more than sufficient to discharge the legacy. This made, at least, a *prima facie* case against him, and we perceive nothing in his defense in any degree tending to defeat the case thus made. There is, it is true, an allegation in the answer, and an offer to prove, "that defendant had paid *large sums of money* to the widow;" but this was, obviously, too indefinite; the amount paid, and the time of payment, should have been stated. It appears to us, "that the merits of this cause have been fairly tried and determined in the Court below," and the judgment must, therefore, be affirmed.

Per Curiam.—The judgment is affirmed, with costs.

John B. Niles, for the appellant.

Nov. Term,
1861.

ACHEY
v.
BURK.

ACHEY and Another v. BURK.

APPEAL from the *Marion* Common Pleas.

Tuesday,
December 10.

Per Curiam.—Action by *Burk* against the appellants to foreclose a mortgage. Judgment for the plaintiff. The errors assigned are, that no process was served on the defendants, and that the judgment was for too large an amount. We find no brief in the record for the appellants. If none was filed, the cause should have been dismissed by the clerk under the sixty day rule. On the supposition that a brief has been filed and misplaced, we have examined the errors assigned.

There is nothing in the first error, as the defendants appeared and answered. There is as little in the second, as it does not

Nov. Term, appear that the judgment was for too much; besides, the
1861. judgment was entered by the agreement of the parties.

HAINES The judgment is affirmed, with 2 per cent. damages and
v. costs.
BOTTORFF.

R. L. Walpole, for the appellants.

HAINES and Another v. BOTTORFF.

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The christian name of the plaintiff was erroneously stated in the summons, but in the complaint was correct. On the return of the summons, the plaintiff had leave to amend it by the complaint.

Held, that there was no error in permitting the amendment.

Tuesday,
December 10.

APPEAL from the *Warren* Circuit Court.

WORDEN, J.—Suit by *Bottorff* against the appellants, to foreclose a mortgage. Judgment for the plaintiff. The complaint was filed in the plaintiff's name of *Samuel Bottorff*, but the defendants were summoned to answer *Jacob Bottorff*. On the return of the summons, the plaintiff moved to correct it by the complaint, and change the name of *Jacob* to *Samuel*. This amendment was permitted, and the defendants excepted.

There was no error in permitting this amendment. *The State v. Hood*, 6 Blackf. 260. Indeed, it may be doubtful whether any amendment was necessary, as the statute provides that no summons, or the service thereof, shall be set aside or adjudged insufficient, where there is sufficient substance about either to inform the party on whom it may be served, that there is an action instituted against him in Court. Code, § 37.

A demurrer to the complaint was overruled, and exception taken. No objection to the complaint is pointed out, and we see none.

Per Curiam.—The judgment is affirmed, with 5 per cent. damages and costs.

Gregory and Harper, for the appellants.

R. A. Chandler, for the appellee.

THE STATE OF INDIANA and Others v. WHITE WATER TOWN-
SHIP OF FRANKLIN COUNTY.

Nov. Term,
1861.

MOORE
v.
BARNETT.

APPEAL from the *Franklin* Circuit Court.

Per Curiam.—The judgment is affirmed, in this case, and the injunction made perpetual, on the case of *The State v. Springfield, &c.*, 6 Ind. 84. *Tuesday,*
December 10.

J. D. Howland, for the appellant.

Geo. Holland, for the appellee.

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MOORE v. BARNETT.

Suit for an accounting, and the settlement of a co-partnership. The cause being at issue, was, upon the written consent of the parties, and by order of the Court, referred to two persons. The agreement of reference, and the order of the Court, provided that if the arbitrators differed in opinion upon any question of fact or law, they should make a minute in writing of the point, for the decision of the Court. An award was made, and two points upon which the arbitrators differed were referred to the Court for determination. On the return of the award, the plaintiff moved to set it aside: 1. Because the arbitrators failed to report the facts of the case. 2. Because they disregarded pertinent evidence. 3. Because they did not pass upon the individual accounts of the parties. 4. Because they did not make a division of the notes and accounts of the firm. 5. Because they appointed other persons to examine the books of the firm. 6. Because they acted upon statements of the defendant, which plaintiff has since discovered to be false, though he could not by diligence have proved them false at the hearing.

Held, that if the reference of the cause was made under §§ 349, 350, 351 of the code, then the report of the referees could only be received by the Court for matters appearing upon the face of the report, including all bills of exceptions taken before the referee; but if the reference was to arbitrators, as at common law, then objections to the award might be shown by extrinsic evidence.

Held, also, that the intention seems to have been to make a common law reference to arbitrators, rather than a trial by referees under the code.

Held, also, that none of the objections to the award were well assigned; no fraud or corruption was charged, and a mere mistake of judgment is not sufficient to vacate an award, at common law.

Nov. Term, *Hell*, also, that the arbitrators had power to appoint other persons to examine the books.

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A request of the Court to state a special finding, made after the Court has commenced to render its judgment, comes too late. Perhaps, also, the request should be accompanied with notice to the Court that the party intends to take the cause to the Supreme Court, upon the finding.

Perhaps, where a suit pending and at issue is referred by a rule of the Court to arbitrators, the award, if defective, should, like a verdict in such cases, be sent back to the arbitrators, on motion of the dissatisfied party, for correction.

Tuesday,
December 10.

APPEAL from the *Vermillion* Circuit Court.

PERKINS, J.—*Moore* sued *Barnett* for an accounting as a partner, in the particular business of selling goods at a town named. A written agreement fixed the terms of the partnership. *Barnett* answered, and the case was brought to issue. The cause was then, upon the written consent of both parties, by order of the Court, referred to Messrs. *Salé* and *Maxwell*. The agreement of reference, and the order of the Court, contained this clause: "That upon any difference of opinion, either of fact or of law, between said arbitrators, they shall make a minute of the fact in writing, for the decision of the judge of the Circuit Court."

The arbitrators made an award, having differed, or having been unable to conclude, upon two points only, namely: a division of certain notes between the parties, and the allowance of an item in favor of *Barnett* of \$1,798, claimed to have been paid by him to Dr. *Scott*. The award was returned to the Circuit Court. The plaintiff there appeared, and for causes assigned, moved that the award be set aside. The Court overruled the motion, and proceeded to hear and settle the two points left open by the arbitrators.

The first point to be determined, is upon the character of the proceedings had for the ascertainment of the facts in this cause. Was it an arbitration, or a trial by referees? This question must be answered before we can determine upon the power of, and the practice in, the Circuit Court, in proceeding to final judgment. If the reference of the cause was made under §§ 349, 350, 351 of the code, then the report of the referees was simply to be reviewed, in the Circuit Court, upon matters appearing on its face, including, as

a part of the report, all bills of exceptions taken before the referees. *The Board of Trustees, &c. v. Huston*, 12 Ind. 276. If the reference was to arbitrators, as at common law, then objections to the award might be shown by extrinsic evidence. *Mills v. Conner*, 1 Blackf. 7; Perk. Prac. 85, 249.

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BARNETT.

The reference was made by rule of Court, upon the written consent of the parties; it was made to two persons; these persons met, (the parties and their attorneys being present,) examined witnesses, adjourned from day to day, and returned the result of their investigations and deliberations to the Circuit Court, where the cause was pending, &c. All these particulars are common, both to an arbitration by reference, of a pending cause, and a trial by referees under the code. See the authorities cited above. But the parties, on the hearing under the reference, did not take exceptions, and have them made a part of the report to the Circuit Court, as they might have done if the trial was regarded as by referees. The persons to whom the reference was made were styled arbitrators, and they called their report to the Court an award. We incline to think that the intention was to have a common law reference to arbitration, rather than a trial by referees under the code. See *Sharp v. Eveleigh*, 5 Eng. L. & E. Rep. 467. This being so, it was proper to impeach the report made to the Court, as an award, for cause; and it will now devolve upon this Court to examine the causes assigned against its validity, to see if they were sufficient. These are the first set of objections to it:

1. The arbitrators failed to report the facts of the case with their award.
2. They disregarded pertinent evidence offered.
3. They did not pass upon the individual accounts of the parties.
4. They did not make a division of the notes and accounts between the partners.
5. They appointed two persons named, to examine the books of the firm.
6. They acted upon the statements of *Barnett*, which *Moore* then supposed to be true, but which he has since discovered he can prove to be false, though he could not, by reasonable diligence, have been able at the hearing to prove them false.

None of these causes were well assigned. Of the first, nothing need be said. No one of the others charges

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fraud or corruption, and mistake of judgment, leading to error on such points, is not sufficient to vacate the award at common law, by which this case is governed. 2 Par. on Cont., pp. 213-216. The causes are all too vague and indefinite. The second does not specify what evidence was disregarded. The third does not show that any individual accounts were submitted to the arbitrators. The sixth does not show what the statements of *Barnett* were, nor of what importance, nor why *Moore*, a co-partner, did not know their truth or falsity. See 2 Par. on Cont., 3d ed., pp. 204, 211. The fifth specifies an act which the arbitrators had power to perform. 2 Par. on Cont., p. 209. The fourth charges the non-performance of an act which it was not the duty of the arbitrators to perform. They were to state the accounts between the partners, to show which had received the greater amount of the partnership effects, &c. The remaining undivided stock, if the partnership should, or should not, be dissolved, would remain common property; if the partnership should be dissolved, it might be placed in the hands of a receiver, or might be amicably divided or disposed of by the partners.

Thus much as to the first set of objections. Touching the item which the arbitrators referred to the judge, evidence was heard, and a decision made. The evidence is not of record. No bill of exceptions contains the words, "this was all the evidence given in the case." We can not, therefore, review the ruling on this point, even if it might be properly done, were the evidence in the record.

The Court refused, also, to state a special finding. It is insisted that the judge was acting, not as a court, but as an arbitrator, and that he was not therefore bound by the rules governing ordinary trials at law. Perhaps this is so. See *Sharp v. Eveleigh*, *supra*. But we think we need not decide the point, as we think the request to the judge, to state such finding was made too late, and perhaps was defective in form. It was not made until the Court was proceeding to render its judgment, and was not, so far as is shown, accompanied with a notice to the Court that the party intended to take the cause to the Supreme Court upon the finding; though the

party says that was his intention. Perhaps the Court should be notified of this intention. Nov. Term,
1861.

As to the second set of objections to the award, it may be remarked, as of the first, that they are vague. They charge no corruption or misconduct on the part of the arbitrators; nothing beyond error of judgment, at most; they do not show, in fact, that the matters which it is alleged the arbitrators failed to consider, were within the submission (see note to Chit. on Cont., 7th Am. ed., p. 791); for only the matters embraced by the issues formed in the suit, would be considered as embraced in the reference of the pending suit. And perhaps, where a suit pending and at issue is referred by rule of Court to arbitrators, the award, if defective, should, like a verdict in such case, be sent back to the arbitrators, on motion of the dissatisfied party, for correction and perfection. See *Blair v. Jones*, 5 Eng. L. & Eq. Rep. 511. THE TOLEDO.
WABASH AND
WESTERN
RAILROAD CO.
v.
BROWN.

As to what was embraced in the reference, the arbitrators would necessarily judge, in the first instance. If they disagreed, they could, in this case, have certified the fact to the judge.

Per Curiam.—The judgment is affirmed, with costs.

John P. Usher and *D. W. Voorhees*, for the appellants.

S. C. Wilson, *J. E. McDonald* and *A. L. Roache*, for the appellee.

THE TOLEDO, WABASH AND WESTERN RAILROAD COMPANY v.
BROWN, ADMINISTRATOR OF MCINTOSH.

APPEAL from the *Allen* Common Pleas.

*Tuesday,
December 10.*

Per Curiam.—The judgment in this case is reversed, upon the two following cases, viz., *The Terre Haute, &c. Co. v. Smith*, 16 Ind. 102; *The Indianapolis and Cincinnati Railroad Co. v. Kercheval*, *id.* 84.

The judgment is reversed, with costs. Cause remanded, &c.
W. Z. Stuart, for the appellant.

Nov. Term,
1861.

SANGSTER and Another v. BUTT.

SANGSTER
v.
BUTT.

Suit by an assignee upon a promissory note for \$200, payable in currency.

Answer : that before notice of the assignment of the note sued upon, the defendant had been summoned as a garnishee in an attachment suit against the payee of the note, before a justice of the peace, and judgment rendered against him, which judgment he had paid.

The transcript of the proceedings before the justice, showed that the garnishee had answered that he had in his hands \$800 of uncurrent money, belonging to the payee of the note sued upon in this case, worth \$620.

Held, that the answer was bad, in not showing, affirmatively, that the demand sued for in this case, and that adjudicated before the justice, were identical.

Tuesday,
December 10.

APPEAL from the *Fountain Circuit Court*.

DAVISON, J.—This is an action by *George Butt* against *Sangster* and *Gish*, upon a promissory note for the payment of \$200, in currency. The note bears date *December 29, 1854*, and was payable at four months, to one *Jeremiah Shade*, who, on *July 27, 1858*, assigned it, by indorsement, to the plaintiff. The defendants answered by four paragraphs. As the first, second and third make no point in the case, the fourth alone will be noticed. The fourth paragraph alleges, "that before the assignment of the note in suit, and before notice thereof to the defendants, one *John Henderson*, by the consideration of *Isaac C. Ho'e*, a justice of the peace, recovered a judgment against the defendant *Sangster*, as garnishee in a suit of attachment against *Shade*, the payee of the note. A certified transcript of the proceedings and judgment in the attachment suit is herewith filed, and made a part of this answer, marked A., which judgment amounted to \$97, and which sum is a judgment against the note sued on, for which the defendants demand judgment; he, *Sangster*, having before the commencement of this suit, paid the same to *Henderson*, the attachment plaintiff." In the proceedings referred to, and made a part of this answer, there is the following: "*April 7, 1856*. This day came *William A. Sangster*, and filed his certified statement, showing that there was then in his hands \$800 of uncurrent

money, worth \$620, belonging to *Jeremiah Shade*, the defendant in the attachment." And further, the proceedings say, that the justice, upon *Sangster's* statement of the effects in his hands, rendered judgment against him as garnishee, for ninety-five dollars and sixty-three cents. A demurrer to this fourth paragraph was sustained, and the defendants excepted.

The demurrer is well taken. The defense does not show, affirmatively, that the demand set forth in the complaint, and that adjudicated upon in the suit before the justice, are identical; the former is by note for \$200, in currency, and the latter for \$800, uncurrent money. As the judgment against *Sangster*, as garnishee, does not appear to have been given upon the claim secured by the note, the demurrer was correctly sustained.

Per Curiam.—The judgment is affirmed, with costs.

Tyler and Ristine, for the appellants.

W. H. Mallory, for the appellee.

Nov. Term,
1861.

NOURSE
V.
THE BOARD
OF
COMMISSIONERS OF
WARREN Co.

NOURSE v. THE BOARD OF COMMISSIONERS OF WARREN COUNTY.

The District Attorney for *Warren* county filed his claim before the *Board of Commissioners* for docket fees, alleged to be due him for prosecuting certain criminal cases, in which the defendants had been acquitted.

Held, that the statutes of this State give no authority to charge the county with the fees in question, and, in the absence of such authority, the county is not chargeable with their payment.

APPEAL from the *Warren* Circuit Court.

DAVISON, J.—*Nourse*, who was the district attorney for the county of *Warren*, on *September* 5, 1859, presented to the *Board of Commissioners* of that county, a claim for services in the *Warren* Common Pleas, in prosecuting, on behalf of

Tuesday,
December 10.

Nov. Term, 1861. *Nourse* v. THE BOARD OF COMMISSIONERS OF WARREN Co. the State, seventeen criminal cases, in each of which the defendant was acquitted; and for the prosecution of each he claims four dollars, making, in the aggregate, sixty-eight dollars. Upon the filing of this claim, the board made an order whereby they refused to allow it, and *Nourse* appealed. In the Circuit Court, to which the case was taken by appeal, the issues were submitted to the Court for trial. There was a finding for the defendants. Motion for a new trial denied, and judgment.

It is conceded that *Nourse* rendered the services for which he claims payment, but contended that the *Board of Commissioners* are not liable to pay, &c. The act regulating fees, &c., approved *March 2, 1855*, was in force when these services were rendered, and provides, (§ 12,) "That the prosecuting attorney's fees shall be as follows, to wit: "Docket fee in the Court of Common Pleas, on plea of guilty, \$2.00." "Docket fee in the Court of Common Pleas on the plea of not guilty, \$4.00. Acts 1855, p. 109. This act, though it points out, specifically, the docket fees to be allowed in the Common Pleas, makes no provision whatever for their payment. Hence, it is argued that the county in which the services were rendered, is liable. This conclusion seems to be incorrect. We know of no rule of procedure, that in cases of acquittal, provides for the payment of costs. At all events, the statutes of this State give no authority, express or implied, to charge the county with the fees in question; and, in the absence of such statutory authority, it is difficult to perceive any principle upon which the county is chargeable. 9 Ind. 139.

Per Curiam.—The judgment is affirmed, with costs.

J. R. M. Bryant and *J. H. Brown*, for the appellant.

R. A. Chandler, for the appellee.

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1861.

GRAYSON v. MEREDITH.

GRAYSON
v.
MEREDITH.

In an action for slander, the parties, by mutual agreement, evidenced by their respective bonds, referred the controversy to the arbitrament of certain persons, whose award, it was agreed, should be made a rule of the Court in which the suit was pending. The arbitrators having heard the case, made an award, in which they found that some slanderous words had been spoken by the defendant of the plaintiff, and directed that the defendant should pay the costs of the suit, accrued and to accrue, including the costs of arbitration. The defendant accepted the award, and, at the next term of the Court, set it up, by way of answer *puis darrein continuance* to the complaint.

Held, that the award was valid, and settled the terms of the judgment; but that the defendant, instead of setting up his award by way of answer, should have filed and proved the submission and award, as a paper in the case, on which the Court should have rendered judgment according to the terms of the award.

APPEAL from the *Decatur* Circuit Court.Tuesday,
December 10.

PERKINS, J.—*Grayson* sued *Meredith* for slander. While the action was pending, the parties, by mutual agreement, evidenced by mutual bonds, referred the controversy to the arbitrament of twelve designated men, whose award was to be made a rule of the Court in which the action was pending.

The arbitrators met, the parties both appeared before them, the cause was heard, and the arbitrators made an award, after a two days' session, as follows, viz., 1. A preamble reciting a history of the case. 2. That *Meredith* had spoken some slanderous words of *Grayson*, and should pay all the costs, accrued and accruing, which, including those of the arbitration, amounted to from fifty to seventy-five dollars. The costs of the arbitration were, in round numbers, forty dollars. This was a valid award. *Cald. on Arb.*, 1 Am. ed., p. 126.

The defendant accepted the award, and, instead of filing it, with the bond, as a paper in the cause, and proving its execution, as was the proper course, he set it up by way of answer, *puis darrein continuance*. The plaintiff demurred to the answer, but the Court overruled the demurrer,

Nov. Term, 1861. and rendered final judgment for the defendant. See *Cald. on Arb.*, pp. 135, 136. This judgment was right as to damages, but wrong as to costs.

GRAYSON
v.
MCKEDITH.

The award, as has been said, was good, and settled the terms of the judgment. *Cald. on Arb.*, p. 126; 2 *Par. on Cont.*, 3 ed., p. 209. Suppose the parties had agreed between themselves upon the terms of the judgment. Suppose they had said to the Court, we have settled this suit; we have agreed that the defendant is guilty of speaking some slanderous words, and that he shall be mulcted in the costs of the suit. The Court would then have entered judgment, that the plaintiff take nothing in damages by his suit, but that he recover his costs and charges. See *Sharp v. Eveleigh*, 5 *Eng. L. & E. Rep.* 467. The award takes the place of such an agreement. It covers all the questions raised by the complaint for slander, and a denial of its allegations. Had such an issue gone to a jury, the questions would have been: did the defendant speak the words; if so, what damage shall he pay? If it was found that the words were spoken, but without malice, (and as to this, the inquiry would come up on the assessment of damages,) then none, or but nominal damages, would be assessed. The award finds the words were spoken, and finds no damages but the payment of costs, implying that there was little or no malice. It was competent for the arbitrators to award the costs, without assessing nominal damages. It does not appear in this case, whether the plaintiff had summoned the defendant before a court of conciliation, prior to bringing this suit, so as to place himself in a position to recover his costs, if successful in the suit, or not.

We have said that the defendant, properly, should have filed and proved the submission and award, as a paper in the cause, on which, as a settlement of the case, and according to its terms, the Court should have rendered judgment; but the form of getting the award before the Court by answer, was not below, and is not in this Court, objected to, and is not matter of substance. If the award had been made upon a submission, oral or written, which did not provide that the award should be made a rule of Court, then the proper mode

of using the award as a bar to a new, or the further prosecution of a pending, suit, might have been by setting it up in an answer. See Chit. on Cont., 7 Am. ed., p. 790, *b*. But where there is no suit pending, or where there is one, and the parties out of court submit to arbitrament, with an agreement that the award shall be made a rule of court, then the award should be filed and proved, as the ground of further action in the cause by the court. So where a suit is pending, and the reference, instead of being made out of court by the parties, is made in court, with their consent, by order of reference, the award should be returned into court, like a verdict, or the agreement of the parties; and in such case, the award will be acted upon without the submission being proved, as the court is cognizant of that fact, and of its own appointees as arbitrators; and when they appear and make a return, the court receives it like reports of its own commissioners in other cases, &c.

Per Curiam.—The judgment is reversed, with costs, with instructions to the Court below to render judgment that the plaintiff take nothing in damages, but that he recover his costs of the defendant, pursuant to the award of the arbitrators.

J. S. Scobey, for the appellant.

James Gavin and *Oscar B. Hord*, for the appellee.

Nov. Term,
1861.

HOBBS
v.
GODLOVE.

HOBBS v. GODLOVE and Another, EXECUTORS OF GODLOVE.

Suit to recover for work and labor done by the plaintiff during his minority.

Answer: 1. Payment, after the plaintiff attained his majority. 2. Set-off, for goods sold, the same being necessities. 3. That the father of plaintiff, during his minority, had hired him to the deceased for six years, or until he should attain his majority, the deceased agreeing to give him certain articles of personal property at the expiration of the term; that after the plaintiff attained his majority, he and his father had a settlement with the deceased of all matters between them, and the plaintiff received \$175, in full payment of the demand sued for.

Held, that the third answer was substantially good.

Nov. Term, 1861. *Held*, also, that the plaintiff could not reply infancy to the first and second answers, as if the plaintiff was paid in full, though an infant at the time, he could not sue for and recover payment again; and the set-off, if for necessities, as alleged, was not avoided by replying infancy.

Hobbs

v.

GODLOVE.

A notice to take depositions "at the post office in the town of *America*, in *Kansas Territory*," is sufficiently certain as to the place of taking, it not being shown that there was another town of that name in the territory, or that the party was in any way misled by the notice.

Section 261 of the code contemplates that a *dedimus* may issue without naming the officer before whom the depositions are to be taken, and also without designating his official character.

It is not material that the *dedimus* in naming the defendants does not show that they are sued as administrators, where it does not appear that the party was misled by the pendency of another suit against the same parties.

Tuesday,
December 10.

APPEAL from the *Delaware* Common Pleas.

WORDEN, J.—On *January* 30, 1860, *Hobbs*, the appellant, filed his claim against the estate of *Joseph Godlove*, in these words, viz.,

"*February* 26, 1854.

"The estate of *Joseph Godlove* to *Eli Hobbs*, Dr., who became twenty-one years of age on *May* 24, 1854.

"To six years' labor done for said *Godlove*, in his lifetime, at his instance and request, to-wit: from *February* 26, 1848, to *February* 26, 1854, at twelve dollars per month, amounting to..... \$864.00

"Cr. By 175.00

\$689.00

"Interest from *February* 26, 1854, to date, 227.37

\$916.37

(Signed) "*ELI HOBBS*."

This claim was duly verified by *Hobbs*.

The defendants answered, issues were formed, and the cause was tried by a jury, resulting in a verdict and judgment for the defendants.

Hobbs appeals. We will notice the pleadings so far as any question is here made upon them. The defendants answered:

Second. "That in the lifetime of said *Joseph*, deceased, he fully paid the plaintiff the whole amount of said claim sued upon, to wit, on *December 25, 1855.*"

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1861.

Fifth. "That on *December, 20, 1855*, the plaintiff was indebted to said *Joseph God'ove*, then in full life, but since deceased, in the sum of eight hundred dollars, &c., upon an account for goods, wares, merchandise and chattels sold and delivered to plaintiff, which were necessities, a bill of particulars of which is filed herewith, which the executors offer to set off, &c."

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v.
GODLOVE

Eighth. "That on or about *February 26, 1848*, *William Hobbs*, the father of said *Eli*, hired to *Joseph God'ove* the said *Eli*, who was then a minor, for the term of six years; for which the said *Joseph God'ove* agreed to pay said *Eli* one horse, saddle, bridle and martingale, and one suit of good clothing, at the expiration of six years, as pay for said services; that before the expiration of said term of six years, the said *Eli*, without any reason known to the defendants, left the employment of said *Joseph*, and went to work for one *Banty*. That afterward, to wit: on *December 25, 1855*, the said *Eli* and *William*, his father, came to the said *Joseph God'ove*, and then and there settled all matters between the said parties, and the said *Joseph God'ove* then paid the said *Eli Hobbs* the sum of \$175, in money, in full payment of the claim filed herein against said *Joseph God'ove*, for said horse, saddle, bridle and martingale, and suit of clothes, and that all parties were then fully satisfied, and so remained until the death of said *Joseph*."

A demurrer was filed to the eighth paragraph, and overruled. This is the first error complained of. We think this paragraph substantially good. That portion of it which alleges that *Eli* abandoned the employment without excuse, may be stricken out as surplusage. If it does no good, it certainly does no harm. The paragraph alleges that the work was done under a special contract made with the father of the plaintiff, who had the right during the minority of his son to hire out his labor and agree as to the compensation. The payment and receipt of the money, in lieu of the articles previously agreed upon, was as complete a

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1861.

HOBBS
v.
GODLOVE.

satisfaction of the claim as if the articles themselves had been delivered. Two objections, however, are made to this view: *First*. That it does not appear that the work sued for was the same work performed under the special contract. We think this sufficiently appears. The work sued for was for six years, commencing *February*, 1848. The special contract was for six years, commencing at the same time. *Second*. That inasmuch as the paragraph admits that *Eli* was a minor when the contract was made, and as it is not averred that he was of age when the payment was made, and as the payment, by the terms of the original contract, was to be made to *Eli*, and not to his father, *Eli* is not bound by the settlement, on account of his minority. We need not stop to inquire whether the arrangement would, or would not, have been binding on *Eli* had he been a minor when the settlement was made, as it sufficiently appears that he was then of full age. The claim filed by him alleges that he became twenty-one years of age on *May* 24, 1854. This settlement is alleged to have been made on *December* 25, 1855. This, on his own showing, was some time after he attained his majority.

To the second, and also to the fifth paragraph of the answer, the plaintiff replied infancy. To these replications a demurrer was sustained, and, as we think, correctly. The second paragraph sets up payment in full of the claim sued upon. We suppose it is clear enough that if the plaintiff was paid in full for the claim sued upon, although an infant at the time of payment, he can not sue for and recover payment again.

It is said that the demurrer to the replication to the fifth paragraph should have been overruled, for the double reason that the replication is good, and the paragraph to which it is replied is bad. The paragraph sets up a set-off, of goods, wares, merchandise, &c., which are alleged to have been necessities. It is claimed that because the answer does not allege that the goods, &c., were necessary for the plaintiff, the replication of infancy was good. The implication is clear enough, from the answer, that the goods, &c., were necessary for the plaintiff, and therefore the replication of

infancy was bad. The allegation in the answer that the goods, &c., sold and delivered to the plaintiff were necessities, can mean nothing else, reasonably, than that they were necessary for the plaintiff.

But it is objected that the answer is bad because it assumes to answer the whole cause of action, while it sets up facts which can only bar a part of it; in other words, that it offers to set off a claim of \$800, in bar of a claim of \$916.37.

This point, however, does not seem to be well taken. The plaintiff's claim, after deducting a credit which he gives, amounted, on *February 26, 1854*, to only \$689. To be sure, he has added interest on it up to the time of filing the claim; but computing the interest on the plaintiff's claim, from *February 26, 1854*, up to *December 20, 1855*, the time when the set-off is alleged to have accrued, and it amounted only to about \$75, making the sum then due him, \$764, being less than the set-off then alleged to have been due.

These are all the questions made in reference to the pleadings. We pass to the only remaining point in the case. The plaintiff moved to suppress some depositions taken by the defendants, on these grounds:

First. "Because the notice does not state any definite place, as prescribed by law, for taking said depositions.

Second. "Because of the insufficiency of the *dedimus*, in not giving the name or office of the person before whom the depositions were to be taken, and in not authorizing the taking of depositions in this case; also variance between the notice and *dedimus*."

We will notice the objections thus pointed out to the Court below; but can not notice others urged in this Court, because not pointed out and made there.

The notice stated that the depositions would be taken "at the post office, in the town of *America, Kansas Territory*." It is objected that the notice was insufficient, because it did not state in what county of *Kansas* the town of *America* was situated, and because it did not state whether *Kansas Territory* was in or out of the *United States*, or upon what continent. There is evidently but little force in the latter

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branch of the objection, and we incline to the opinion that the first is not well taken. Had there been an affidavit showing that there were two *Americas* in *Kansas Territory*, or that the plaintiff did not know, and could not readily ascertain, where, in the territory, the town named was situated, or that he was in any way misled by the notice, the question would have presented a different aspect. Without such, or a similar, showing, the notice should, we think, be deemed sufficient.

The *dedimus* was directed "to any officer legally authorized to take depositions." The depositions were taken before a justice of the peace. Section 261 of the code clearly contemplates that a commission, or *dedimus*, may issue without naming the officer, and, as we think, without designating the office of the person, before whom the depositions are to be taken. The commission was well directed "to any officer legally authorized to take depositions."

The objections that the *dedimus* did not authorize the taking of depositions in this case, and that there is a variance between the notice and the *dedimus*, are taken on the ground that the *dedimus*, in naming the defendants, does not state the fiduciary character in which they are sued, while the notice does.

These objections are not well taken. The suit was against the defendants, in a particular capacity to be sure, but still it was against them; and it is not material that the *dedimus* did not state that particular capacity. The plaintiff was in no manner misled, as it does not appear that he had any other suit pending against the defendants. The *dedimus* was sufficient, and the variance between that and the notice was of no consequence. If a writ be general, the complaint may describe the parties in a particular character. *Cole v. Peniwell*, 5 Blackf. 175.

There is no error in the record for which the judgment ought to be reversed.

Per Curiam.—The judgment is affirmed, with costs.

Walter March, for the appellant.

David Nation, for the appellees.

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NORTON and Another v. HOOTEN.

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Errors of law occurring on the trial, which do not appear to have been in some way brought to the attention of the Court below, will not be noticed in the Supreme Court.

Where personal property is sold by a person not at the time in the possession of it, there is no implied warranty of title.

APPEAL from the *Knox* Common Pleas.

Tuesday,
December 10.

DAVISON, J.—*Hooten*, who was the plaintiff, sued *James Black*, *Nelson Norton*, and *James Garret*, upon a promissory note for the payment of \$350. Process, as to *Black*, was returned "not found." The other defendants, *Norton* and *Garret*, appeared and answered thus: "That *Black* was indebted to the plaintiff to the amount of the note, and the plaintiff desiring to secure the same, agreed that if *Norton* and *Garret* would go security on the note, he would convey to them certain wheat, then growing and unharvested, which he had before that time purchased on execution, as the property of *Black*, and which he, plaintiff, then pretended to own. And that previous to said sale to the defendants by the plaintiff, he had sold the same wheat to *Black*, and that the wheat so sold by him to them was taken and sold on execution against *Black*, wherefore the consideration upon which they executed the note has failed," &c. To this answer the plaintiff replied: 1. By a general traverse. 2. That the defendants, at the time they signed the note, knew that the wheat had been sold to *Black* upon the condition that he would give security on the note, and that he consented to, and did assign the wheat to the defendants at their request, and to prevent the same from being taken from *Black* by his creditors. 3. That the plaintiff, at the time of the sale of the wheat to the defendants, did not have the same in his possession. 4. That the defendants, when they took an assignment of the wheat, well knew that it had been sold to *Black*, &c.

To the second and third paragraphs of this reply the defendants demurred, but these demurrers do not appear to have been decided by the Court. The issues of fact were submitted to a jury, who found for the plaintiff, and the

Nov. Term, Court, over a motion for a new trial, rendered judgment, &c.
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The causes for a new trial are thus assigned: 1. The verdict of the jury is contrary to law and evidence. 2. That the second, third, and fourth instructions given to the jury were erroneous.

For a reversal, the appellants contend: 1. That it was error to proceed to trial and final judgment without disposing of the demurrers to the second and third replies. 2. That the motion for a new trial should have been sustained.

As the inquiry involved in the first position, namely, whether it was, or not, error to proceed to final trial, leaving the demurrers undisposed of, does not appear to have been presented, in any form, to the lower Court, it can not be deemed legitimately before this Court. Hence, that point will not be further noticed.

But it is argued that the Court erred in giving the fourth instruction. That instruction is in these words: "A party, not in possession of personal property when he sells it, does not warrant the title." It is insisted that this does not express the law; "that the Court ought to have said, *does not implied'y warrant the title.*" We think otherwise. The evidence shows that the property, when the plaintiff sold it, was not in his possession; but it does not, in any degree, tend to show an *express* warranty of title. The result is, the instruction, as applied to the evidence, was a proper direction to the jury; because, in view of the facts proved, it must have related, alone, to an implied warranty. 1. Par. on Cont., pp. 458, 459.

We have looked into the evidence, and are of opinion that it authorized the conclusions of the jury.

Per Curiam.—The judgment below is affirmed, with 5 per cent. damages and costs.

D. McDonald and *C. M. Walker*, for the appellants.

W. Henderson, for the appellee.

BURKHAM v. BEAVER.

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Where the mortgagor has sold his equity of redemption in the mortgaged premises, he is not a necessary party to a bill for foreclosure, but the order of sale, in such case, should be limited to the mortgaged premises, and no personal judgment taken against the holder of the equity of redemption.

APPEAL from the *Rush* Common Pleas.

Tuesday,
December 10.

Per Curiam.—One *Hurst* mortgaged a tract of land to *Beaver*. Afterward, the equity of redemption was conveyed to *Burkham*, "subject to the mortgage."

Beaver now files a complaint to foreclose against *Burkham*. *Shaw v. Hoadley*, 8 Blackf. 165, is in point, that *Hurst* was not a necessary party. There was a credit on the note secured by the mortgage, of the amount of another note given toward payment; but that note had not been paid, had not operated as a payment on the mortgage, and was not deducted in rendering the decree. This was right. There is nothing to show that *Burkham* was misled, but rather the contrary. The order of sale is limited to the mortgaged premises. There is no personal judgment against *Burkham*.

The judgment is affirmed, with 3 per cent. damages and costs, but with this instruction, viz., that the Court below so modify its language, as to expressly exempt *Burkham* from personal liability.

Clark and *Hackleman*, for the appellant.

L. & W. O. Sexton, for the appellee.

Cox and Others v. MATTHEWS and Another.

A died intestate, in the year 1835, seized of certain real estate, leaving an only child, *B*, and his widow, surviving him. In the following year *B* died intestate, leaving no issue, and without brothers and sisters, or their descendants, alive, but leaving uncles and aunts, who were all brothers and

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sisters of the half blood of her father. The father of *A.* was married twice, having by his first marriage two children, *C.* and *D.*, and by his second marriage one child, the said *A.*; he then died himself, and his widow married again and had two children, *E.* and *F.* The said *C.*, *D.*, *E.* and *F.*, the uncles and aunts of *B.*, of the half blood of her father, were living at the time of her decease. After the death of *B.*, her mother married again, and had issue. Suit by *E.* and *F.* against the vendees of *C.* and *D.* to recover one half of the land. On the trial, the defendants offered in evidence the record of a suit in chancery, brought by *C.* and *D.* against *E.* and *F.*, and others, to obtain distribution of the personal estate of *A.*, and also to obtain a decree that the complainants were entitled to the lands left by *B.*, to the exclusion of *E.* and *F.*, and for partition, &c. The bill was filed in the office of the clerk of the Circuit Court, in December, 1839, and notice thereof given by the petitioners by publication in a newspaper. The suit was called in the notice, after entitling the cause, "Bill of partition of real estate," and notified the defendants that the petitioners had filed their petition for partition, according to law, among those entitled, of the real estate of which *B.* died seized, &c. The notice was signed by the petitioners, and, together with an affidavit of its publication for four weeks, &c., was filed in Court, and the record recites that "it appearing to the satisfaction of the Court that said publication was made," &c., "thereupon, on motion, the defendants were defaulted," &c. It was therefore ordered and decreed that *C.* and *D.* were the heirs of *B.*, and that the title of said lands be vested in them.

Held, that on the death of *B.* the land descended to the brothers and sisters of her father; and that they were of the half blood, only, could make no difference; nor could the fact that *E.* and *F.* were half brothers of *A.* through the maternal line make any difference as to their rights, as they were equally related to *B.* with the said *C.* and *D.*

Held, also, that the doctrine of shifting descents never prevailed in this State, but where the descent is cast, and the estate vested in him who is the heir at the death of the ancestor, the estate can not be divested by the subsequent birth of nearer heirs; and hence, the half brothers and sisters of *B.*, born after her decease, not being *in ventre sa mere*, could not take the estate from the uncles and aunts of *B.*, in whom it had vested.

Held, also, that the bill in chancery, the record of which was offered in evidence, did not make such a case as was contemplated by the act of 1838, concerning the partition of lands (R. S. 1838, p. 426.); that act contemplating cases where the rights of the defendants in the estate were not controverted, and the bill referred to making a case in which the rights of the defendants in the land were controverted and denied; and hence, the notice provided for in that act, which was the only notice given of the chancery suit, was not sufficient.

Held, also, that the notice was not sufficient to give a court of chancery

jurisdiction of the persons of the defendants, under R. S. 1838, p. 444, not being issued and signed by the clerk as an official act; that the defendants, had it come to their notice, might have treated it as a nullity, and hence, the Court did not acquire jurisdiction of the persons of the defendants.

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Held, also, that as the record offered sets out the notice, and the proof of its publication, and shows precisely upon what the Court acted in assuming jurisdiction of the case, and as that notice was insufficient and void, so the decree rendered thereon was void, and the record thereof was properly rejected as evidence.

Held, also, that the record was not admissible as constituting an estoppel *in pais*, as the vendees of *C.* and *D.* must be presumed to have known that the decree against *E.* and *F.* was void.

The Court instructed the jury "that to constitute an equitable estoppel, it must be shown that the plaintiffs were apprized of each sale to innocent vendees before it was made, so that they might have had an opportunity to inform the purchaser of their interest in the property."

Held, that the instruction was well enough, as its evident meaning was, that the plaintiffs must have been apprized of the intended sales.

APPEAL from the *Tipppecanoe* Circuit Court.

Tuesday,
December 10.

WORDEN, J.—This was an action by the appellees, *Matthews* and *Tufts*, against the appellants, for the recovery of the possession of certain real estate, described in the complaint. Trial by jury; verdict and judgment for plaintiffs, for an undivided half of the estate described. The defendants appeal, and ask a reversal on grounds that will be noticed.

The facts are, in brief, that in 1835, one *Samuel Hall* died intestate, seized of the land in controversy, leaving a widow and a daughter, *Lucy Hall*. Upon the death of *Samuel Hall* the land descended to his daughter *Lucy*, subject only to the widow's dower. In 1836 *Lucy*, being then an infant, also died without issue, and without brothers or sisters, or their descendants. She left, however, uncles and aunts, as follows: *John Matthews* and *Hannah Tufts*, formerly *Hannah Matthews*, who were the plaintiffs in this suit, and also *Gordias A. Hall* and *Ruth Wetherell*, formerly *Ruth Hall*. The father of *Samuel Hall* had issue by his first wife, the said *Gordias* and *Ruth*. His wife dying, he married again, and had issue by his second wife, the said *Samuel*, and himself died. His widow, the mother of *Samuel*, married a *Matthews*, and had issue, the said *John* and *Hannah*. All of the persons

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MATTHEWS. Upon the death of *Lucy Hall*, the land descended to the brothers and sisters of her father. R. S. 1831, § 3, p. 208. That they were only brothers and sisters of the half blood, can make no difference. *Clark v. Sprague*, 5 Blackf. 412. Nor can it make any difference that *John* and *Hannah* were half brother and sister through the maternal line. They were equally related to *Samuel Hall*, with *Gordias* and *Ruth*, and inherit equally with them the estate.

The defendants in this suit claim the land under conveyances made by said *Gordias Hall*, and *Ruth Wetherell* and her husband, who attempted to convey the entire estate, claiming to own the same to the exclusion of said *John* and *Hannah*. We have seen that the estate descended equally to all the half brothers and sisters of *Samuel Hall*; and the plaintiffs were entitled to recover the one half thereof, unless something has transpired to defeat their right.

A point arises in the case, which was ably discussed in another case, now dismissed, by the counsel herein, and which may be noticed. We now notice the point, because if there is an outstanding title to the premises in some one else, the plaintiffs can not recover.

It appears that after the death of *Lucy Hall*, her mother married again, and had issue, three children, born in 1838, 1843 and 1846. These children were half brother and sisters to *Lucy*. Had she died leaving such half brother and sisters, the estate would have gone to them, instead of the half brothers and sisters of her father. The estate having vested in the half brothers and sisters of *Samuel Hall*, upon the death of *Lucy*, the question arises whether it was *divested* by the subsequent birth of kindred of nearer blood to *Lucy*. If so, the title is in them, and the plaintiffs have no right to recover.

The common law rule is thus stated in 2 Greenleaf's *Cruise on Real Property*, p. 145:

"It has been stated to be a rule of law, that the freehold shall never, if possible, be in abeyance. It is therefore settled that lands shall always descend to the person who is heir at the time of the death of the ancestor; but *such*

descent may be defeated by the subsequent birth of a nearer heir." §11. This author gives several instances of the application of this rule, among which are:

"If a man has issue, a son and a daughter, and the son purchases lands in fee, and dies without issue, the daughter shall inherit the land from him. But if afterward the father has issue, a son, this son shall enter into the land, as heir to his brother, and oust his sister."

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"So where a son purchased land, and died without issue, his uncle entered as his heir; two years after the father had issue, another son, and it was held such other son might enter on his uncle." *Id.* §14. To the same effect, see 1 Coke, 10, b; 2 Wen. Blackstone, 208, note 9; 2 Bac. Abr. 296, A.

This principle may have been acted upon in some of the other States of the *Union*, as a part of the common law, but we are of opinion that in this State, the doctrine of shifting descents never prevailed. Here, undoubtedly, a child *en ventre sa mere* is considered as *in esse*, for the purposes of inheriting; but when the descent is cast, and the estate vested in him who is heir at the death of the ancestor, the estate can not be divested by the subsequent birth of nearer heirs. The feudal policy of tying up estates in the hands of a landed aristocracy, and which had much to do with the doctrine of shifting descents, as recognized by the *English* canons of descent, is contrary to the spirit of our laws, and the genius of our institutions. It has been the policy in this State, and in this country generally, not only to let estates descend to heirs equally, without reference to sex or primogeniture, but also to make titles secure and safe to those who may purchase from heirs upon whom the descent may be cast. Our laws have defined and determined who shall inherit estates upon the death of a person seized of lands. When those thus inheriting make conveyances, the purchasers have a right to rely upon the title thus acquired. If titles thus acquired could be defeated by the birth of nearer heirs, perhaps years afterward, great injustice might, in many cases, be done, and utter confusion and uncertainty would prevail in reference to titles thus acquired. We are of opinion that the doctrine of shifting descents does not

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We now proceed to the other questions in the case. On the trial below, the defendants offered in evidence the record of a suit in chancery in the *Tippecanoe* Circuit Court, which was rejected. The record was offered as an absolute bar to the action; but should the Court be of opinion that it was not a bar, then it was offered, in connection with the other evidence, as an estoppel *in pais*.

The rejection of the record constitutes the principal question in the cause.

The suit, of which the record was offered in evidence, was brought by *Gordias A. Hall, John Wetherell* and *Ruth* his wife, against *John Matthews* and *Hannah Tufts*, the plaintiffs herein, also the husband of said *Hannah*, and *William Farmer*, administrator *de bonis non* of the estate of *Samuel Hall* deceased, and also *Samuel A. Huff* and *Miriam* his wife, who was the widow of *Samuel Hall* deceased.

It seems that *Huff* and wife claimed the property left by *Hall* deceased, and the object of the bill was to obtain distribution of the personal estate to the complainants therein, and also to obtain a decree that they, the said *Gordias* and *Ruth*, were entitled to the land as the heirs of said *Lucy*, to the exclusion of said *Matthews* and *Hannah Tufts*, and for partition thereof. The bill sets out the relationship of said *Matthews* and *Hannah Tufts* to *Lucy Hall*, and makes them parties; but it does not admit that they had any interest in the land or personal property. On the contrary, the said *Gordias* and *Ruth* claimed the property, in their bill, to the exclusion of every one else, except the right of the widow to dower. The following passages from the bill will serve to show its true character, as setting up a claim to the land adverse to the rights of the plaintiffs in this suit. It alleges that *Lucy Hall* died, "leaving as her heirs at law your petitioners, the said *Gordias A. Hall* and the said

Ruth Wetherell," &c. "Your petitioners pray that the said *Danforth Keys Tufts* and *Hannah Tufts* his wife, and the said *John Matthews* may be made defendants to this, their petition, and that the Court will determine and ascertain their right or rights, if any, to any part of said personal or real estate. And your petitioners, *Gordias A. Hall* and *Ruth Wetherell*, aver that they are the uncle and aunt of the said *Lucy* upon the part of her father, said *Samuel Hall*, and that they are entitled to said personal and real estate, saving the said widow's dower during her life, as the sole heirs of the said *Lucy*, infant, or as representing the said *Samuel Hall*." There is a prayer, among other things, that "commissioners may be appointed, according to law, to make partition of the real estate according to law and the rights of the parties."

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The bill was filed in the office of the clerk of the *Tippecanoe* Circuit Court, on *December 21*, 1839. Thereupon, the following notice was issued:

"STATE OF INDIANA, } Circuit Court of *Tippecanoe* Coun-
"TIPPECANOE Co., SCT., } ty, of *February* term, 1840.

Gordias A. Hall, *John Wetherell* and *Ruth Wetherell* his wife v. *William Farmer*, administrator *de bonis non* of *Samuel Hall* deceased, administrator of *John D. Farmer* deceased, *Samuel A. Huff* and *Miriam* his wife, *John Matthews*, and *Danforth Keys Tufts* and *Hannah* his wife.

"*Bill of Partition of Real Estate.*

"The said defendants, *Samuel A. Huff* and *Miriam* his wife, *John Matthews*, *Danforth Keys Tufts* and *Hannah* his wife, are hereby notified that the said *Gordias A. Hall*, *John Wetherell* and *Ruth* his wife, have filed their petition in the Circuit Court of *Tippecanoe* county, *Indiana*, for partition, according to law, among those entitled, of the real estate of which *Lucy Hall*, late of said county, heir at law of said *Samuel Hall*, died seized and possessed; said real estate lying and being in said county, and particularly described in the petition aforesaid; and that said petition prays an allotment of dower in said real estate to the said *Miriam Huff*, and that the application for said partition will be made

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 1861. of said Court, to wit: the *February* term thereof, of the
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"GORDIAS A. HALL,
 "JOHN WETHERELL, } *Petitioners.*
 "RUTH WETHERELL, }

"December 31, 1839."

At the *February* term of the Court, 1843, the foregoing notice was filed, together with an affidavit showing its publication. The record recites, that "it appearing to the satisfaction of the Court that *said publication* was made for four successive weeks in a public newspaper, said last publication being more than sixty days before the first day of the present term of this Court, as will more fully appear by said affidavit; and *thereupon*, on motion, said *Danforth Keys Tuffs*, *Hannah Tuffs* his wife, and *John Matthews* are three times called and come not, nor say any thing in answer to said bill, but leave the complaints therein wholly undefended. It is therefore considered," &c. On the default thus taken, among other things, it was "finally ordered, adjudged and decreed that said complainants, *Gordias A. Hall* and *Ruth Wetherell* are the heirs at law of said *Lucy Hall*, daughter of said *Samuel*, and that the title of said real estate above fully described, of which said *Lucy Hall* died seized, is hereby decreed to be vested in said complainants, *Gordias A. Hall* and *Ruth Wetherell*, in fee, subject to the right of dower of said *Miriam Huff* in said lands."

Passing by any question as to the power of a court of equity to determine who are, and who are not, heirs to an estate, as matter of law, there being no controversy as to the facts, we proceed to inquire whether the Court had acquired jurisdiction of the persons of said *Matthews* and *Tuffs*, so as to be authorized to render a decree against them excluding them from their inheritance. If not, the decree, as against them, is a nullity. *Babbitt v. Doe*, 4 Ind. 355.

The statute on the subject of the partition of real estate in force at the time the proceedings were had (R. S. 1838, p. 426), provides "that when two or more persons are proprietors of any real estate, any of whom are desirous of

having the same divided, it shall and may be lawful for the Circuit Court of the county where such real estate may be situated, on the application of any such person, (notice of such application having been previously given by the party so applying, for at least four weeks, in some public newspaper in this state) to appoint three disinterested freeholders, residents of said county, not related to either of the parties, as commissioners for dividing the said estate," &c. Were the bill in question to be deemed as governed by the provisions of this act, the notice would probably be sufficient. But we are of opinion that the bill filed did not make such a case, nor seek such remedy, as is contemplated by the act above cited, and hence that the notice given, as in that act is provided for, is not sufficient. The act in question contemplates cases where the respective rights of the defendants, in the estate to be partitioned, are not controverted. On a default, in proceedings under the act in question, it was necessary for the plaintiff, not only to show title in himself, but also to show that the defendants *were common proprietors with him* of the land, to justify the appointment of commissioners. *Lease v. Carr*, 5 Blackf. 353; *Shaw v. Parker*, 6 *id.* 345.

The notice provided for in the act under consideration, applies as well to residents as to non-residents of the State. The notice was intended, of course, to be seen by the defendants. Upon seeing such notice published in the paper, the defendants to the petition for partition would be in no manner advised that by the petition it was sought to exclude them from their interests in the land. They would have a right to presume, under the law, that if they made default, no proceedings could be had on the petition to dispute their joint ownership with the petitioners. Knowing that under such petition their joint ownership could not be controverted, they might well make default, trusting to the fairness of the division that might be made by the commissioners to be appointed.

The same act provided that courts of equity should have concurrent jurisdiction with courts of law in cases of partition.

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Was the notice sufficient to give a court of equity jurisdiction of the persons of *Mattheers* and *Tyfs*? This question must be answered by a reference to the statute providing how notice should be given. It was provided that "whenever it should be made satisfactorily to appear, by the affidavit of some disinterested person, filed during the vacation of the court in the clerk's office of the proper county, that any defendant, or defendants, to any bill in chancery, or to any petition or libel for divorce, filed in the clerk's office aforesaid, is not a resident of this State, it shall be the duty of the clerk aforesaid forthwith to make publication for three successive weeks, in some public newspaper printed weekly in the county where the said bill, petition or libel may be filed; and if there be no such newspaper printed in said county, then in the nearest weekly newspaper printed in some other county, setting forth the filing of such affidavit, and notifying said defendant, or defendants, to such bill, libel, or petition, and that unless such defendant, or defendants, plead, answer or demur to the same, on or before the calling of the cause at the next ensuing term of the said court, the bill, as to such defendant, or defendants, will be taken as confessed." R. S. 1838, p. 444. The notice in question was published in vacation, and without any previous order of the Court, and it seems to lack nearly all the essentials required by the statute. It does not state the filing of the affidavit as required, nor does it notify the defendants that the bill would be taken as confessed unless they should plead, answer, or demur thereto; nor was it given *by the clerk*, as required by the statute. Whatever might be the effect of the other defects in the notice, we think it clear that it should have been given by the clerk, and purport to be an official act, in order to have any efficacy. The notice was given and signed only by the plaintiffs in the bill, and the defendants thereto, had it come to their knowledge, might disregard it, and treat it as a nullity. As well might a summons, or a subpœna in chancery, be issued by a party instead of the clerk. The law requires the one, as well as the other, to be the act of the clerk, and not of the party. The Court did not,

in our opinion, acquire jurisdiction by the publication of the notice in question.

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But it is insisted that as the Court found that due publication had been made, that finding is conclusive, and that we can not look to the publication as set out. The Court, however, did not find that due publication had been made. The record sets out the notice, and proof of its publication, and that it appeared "to the satisfaction of the Court that *said publication* was made," &c. Herein the case differs widely from that of *Sargeant v. The State Bank of Indiana*, 12 Howard, 371, which is relied upon here. In that case, the record recited that "due and legal notice" had been given, without setting out the notice or proof of service. It was held that the record was conclusive.

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In the case before us, the record shows precisely on what the Court acted. It sets out the notice and proof of its publication, and upon the publication of that notice the Court acted. Had the record not contained the notice or the proof of its publication; or, indeed, had it been entirely silent on the subject of notice, it would perhaps be presumed to have properly acquired jurisdiction over the persons of the defendants. *Horner v. Doe*, 1 Ind. 130; *Babbitt v. Doe*, 4 Ind. 355. But it is said that "when the record itself shows expressly, or by necessary implication, that a foreign or domestic, a superior or inferior, tribunal has proceeded without notice, and without any sufficient excuse or reason for the want of notice, no further presumption can be made in its favor, and it may be impeached and set aside collaterally, as well as in the course of regular proceedings in error. 1 Smith's Lead. Ca., 5 Am. Ed., p. 843, and authorities there cited.

In the case before us, a subpœna had been returned "not found," as to *Matthews* and *Tufts*, and it was abundantly clear from the record that the Court took, or rather sought to take, jurisdiction of the defendants therein, *Matthews* and *Tufts*, by virtue only of the notice thus set out and its publication. That notice being insufficient and void, it follows that the decree was void, and the record properly rejected.

We perceive no legitimate ground for the introduction of the record as an estoppel *in pais*. To be sure, a person may,

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by standing by and seeing his property sold, under circumstances that require him to interpose, be afterward estopped from setting up his title. See, on this subject, *Galling v. Rodman*, 6 Ind. 289; *The State v. Holloway*, 8 Blackf. 45.

In *Lawrence v. Brown*, 1 Seld. 394, it was held that to constitute an *estoppel in pais*, it was necessary not only that the person to be estopped, by his words or conduct, should have caused the other party to believe that by his purchase he would acquire a title discharged of his claim, but that the purchaser must have acted upon such belief in making such purchase and in the payment of the purchase money. Again, it is said that "good faith and diligence must, moreover, occur on one side, with the want of them on the other; and no estoppel will arise in the absence of actual fraud, unless the purchaser was destitute, not only of all actual knowledge of the true state of the title, but of the means of acquiring knowledge by a recourse to the record." 2 Smith's Lead Ca., 5 Am. Ed. p. 662. If the purchasers from *Gordias A. Hall* and *Ruth Wetherell* purchased on the faith of the decree, they purchased with the means before them of knowing the title of said *Matthews* and *Hannah Tufis*, for the bill set forth the relationship which they sustained to *Lucy Hall*, and they must be presumed to have known that the decree against *Matthews* and *Tufis* was void, for the want of notice to them. It was their own fault and negligence that they thus purchased, with the means before them of knowing that they were acquiring a title to only one half of the land.

We perceive nothing in the evidence offered outside of the record, that would entitle the record to admission in connection with such evidence, as such estoppel.

It was proved that both *Matthews* and *Tufis* advanced to *Hall* seventy-five dollars for the purpose of assisting in carrying on a suit to recover the property, and that after the decree the money was refunded to them by *Hall*. An extract from the deposition of *Gordias A. Hall*, which was used on the trial, will best explain the nature of the transaction. He says, that "previous to the commencement of that suit, and as I have before stated, on information of Mr. *Farmer*, the administrator, I supposed *John Matthews*,

Danforth K. Tufis and wife, *Hannah Tufis*, were co-heirs with myself and Mr. *Wetherell*, and *Ruth Wetherell* his wife, and a fund was made up of seventy-five dollars each, by *Matthews* and *Tufis*, to commence proceedings and suits to obtain the property represented by *Farmer*, said administrator, and belonging to the estate of said *Hall*, deceased; and *Matthews* and *Tufis* did place in my hands those amounts," &c. The money, it seems, was raised for the purpose of carrying on a suit to recover the property represented by the administrator, for the benefit of all the heirs of *Lucy Hall*, including, of course, *Matthews* and *Tufis*. These last parties lived in a distant State, and *Hall*, instead of bringing a suit to recover the property in the name, and for the benefit, of all the heirs of *Lucy Hall*, as the furnishing of the money implies, brought no such suit at all. Whether he was guilty of bad faith, or not, we need not determine; but it is certain that the money never was applied to the purposes for which it was intended. He brought a suit claiming the property for himself and Mrs. *Wetherell*, to the exclusion of *Matthews* and *Tufis*, and after he had succeeded in getting the decree against them, they, upon being informed that the Court had decided against them, and perhaps without knowing the nature of the suit that had been thus brought and determined, received back the money that had been advanced by them. There is clearly nothing in these circumstances that should entitle the record to admission in evidence.

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There is but one more point made in the brief of counsel for the appellants, and that relates to an instruction of the Court to the jury, as follows: that "to constitute an equitable estoppel of the rights of the plaintiffs in this action, it must be shown that the plaintiffs were apprized of each sale to innocent vendees, before it was made, so that they might have had an opportunity to inform the purchaser of their interest in the property sold."

The counsel say: "Now if this instruction is law, the doctrine of equitable estoppel is overthrown in *Indiana*; for how could a person have knowledge of an event before it happened."

Nov. Term, 1861. We think the instruction is well enough. Its evident meaning is, that it must be shown that the plaintiffs were apprized of each intended sale, &c., before it was made, and the jury could not have understood it otherwise.

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Per Curiam.—The judgment is affirmed, with costs.

Z. Baird, H. W. Chase and J. A. Wilstach, for the appellants.

S. A. Huff, G. O. Behm, J. E. McDonald and A. L. Roache, for the appellees.

THE MICHIGAN CENTRAL RAILROAD COMPANY v. PORTER and Others.

By our statute (1 R. S. 1852, p. 113) the stock of a railroad company in this State is to be assessed against the company, and not against the individual stockholder, and the term "stock," as used in the statute, includes not only stock subscriptions, but all the actual, tangible property of the company.

Where a foreign railroad corporation, under a contract with a company chartered in this State, constructs, equips and operates a portion of the line of the latter company in this State, the stock in such road, so constructed, must be regarded as vested in the company under whose charter it was built, and can not be assessed against the foreign corporation for taxation; nor can the road bed, in such case, be assessed as real estate against the foreign corporation, and the rolling stock as personal property, since our statute requires it all to be assessed as corporation stock.

Tuesday,
December 10.

APPEAL from the *Laporte* Circuit Court.

WORDEN, J.—The appellant, who is a corporation created by a law of the State of *Michigan*, filed her complaint against *Porter*, who was the treasurer of the county of *Laporte*, in this State, to restrain him from levying upon and seizing certain cars and locomotives of the plaintiff, for the purpose of satisfying certain taxes alleged to have been wrongfully and illegally assessed against the plaintiff. Trial by the Court; finding and judgment for the defendant. The proper steps were taken to properly present to this Court the questions involved in the case.

The substantial facts in the case, as they appear from the pleadings and evidence, are as follows:

The New Albany and Salem Railroad Company, a corporation created by a law of the State of *Indiana*, having, or claiming to have, the corporate right of constructing and running a railroad from *Michigan City*, in the State of *Indiana*, westwardly, in the direction of *Chicago*, as far as the west line of the State of *Indiana*; and the plaintiff, *The Michigan Central Railroad Company*, having, under her charter, constructed a railroad from the city of *Detroit* to *New Buffalo*, in the State of *Michigan*, and from thence to the line of the State of *Michigan*, and having also, by an arrangement and contract with the commissioners of the western division of *The Buffalo and Mississippi Railroad Company*, constructed a railroad from the *Michigan* line to said *Michigan City*; an agreement was entered into between the appellant and the *New Albany and Salem Railroad Company*, in *April*, 1851, by which it was stipulated, among other things, that the *Michigan Central Railroad Company* should, on certain terms and conditions therein mentioned, subscribe to the capital stock of the *New Albany and Salem Railroad Company* the amount of \$500,000; and that the *New Albany and Salem Railroad Company* should complete its road from *Lafayette* to *Michigan City*. The agreement proceeds to stipulate, that "that part of the road from *Michigan City* to the State line of *Indiana*, between that State and *Illinois*, shall be constructed by, and under the superintendence of, the *Michigan Central Railroad Company* and its officers and agents, and that the same shall stand pledged, and shall be, and is hereby bargained, conveyed and mortgaged to the said *Michigan Central Railroad Company* and its successors and assigns forever, and all its appurtenances, depots, shops, water stations, rights of way, tracks, side tracks, and fixtures and equipments of every kind and description which may be hereafter constructed or built upon the same, and also the right to construct, complete and perfect the same with single or double tracks, and also to equip, operate and control the same when constructed; and to that end the party of the first

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part constitutes the said party of the second part, its successors and assigns, its agent, with full power to go on and construct the said road and its appurtenances, and from time to time to add thereto; and to enable that to be most effectually accomplished, the said first party will do all such acts, and take such actions, as shall become equitable and proper; the said *Michigan Railroad Company* paying all expenses and costs, and always saving the said first party harmless, and keeping them fully indemnified against all suits, actions, rights of action and claims, which may event by reason of any act done or omitted to be done by the said *Michigan Central Railroad Company*, its officers or agents. And inasmuch as it is uncertain how much the said road from *Michigan City* to the *Illinois* line will cost, together with its depots, tracks, &c., and as it will be inconvenient for the first party to give attention to the same in its details and expenses, and as the parties are desirous of affixing some limits beyond which it shall not be required of the said first party to go, in case it shall redeem the said road, its fixtures and equipments; therefore it is mutually agreed that the said *Michigan Central Railroad Company* (shall be) entitled to a claim upon said road, and its depots, appurtenances and equipments, for all the moneys invested therein, either immediately or hereafter, to the extent of one million of dollars, which shall be taken and deemed to be a contract price for the construction of said road, liquidated and settled, whether the same shall cost more or less. . . . The following terms are agreed upon as compensation for interest upon the sum of one million of dollars, viz., the said *Michigan Central Railroad Company* shall operate and manage the said road from *Michigan City* to the *Illinois* line, at its own expense and risk, and shall be entitled to receive the revenues thereof, and shall, in addition thereto, receive interest upon the redemption of said road, but at the rate of only five per cent. upon the amount thereof. And it is mutually agreed, that if, at the expiration of forty years from the date of these presents, the said *New Albany and Salem Railroad Company* shall pay to the said *Michigan Central Railroad Company*, its successors or assigns, the full sum of one million

of dollars, with interest thereon at the rate aforesaid, then this instrument, so far as it operates as a mortgage or pledge, shall become null and void, otherwise remain in full force and virtue in law; and in the mean time the said *Michigan Central Railroad Company* shall remain in full possession and control of said road and its equipments, and shall have full right to keep the same in repair, operate and manage the same, and receive the revenues thereof, and shall proceed to construct the same at its pleasure, or as soon as it may be deemed proper."

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Under this agreement, the appellant constructed a railroad from *Michigan City* to the west line of the State, and has been operating the same since its completion. The entire road makes a continuous line from *Detroit* to *Chicago*. It first enters this State in the county of *Laporte*, and runs thence through the counties of *Porter* and *Lake*. The principal office of the appellant, for the transaction of its business is not in this State, but in the city of *Detroit*.

The appellant having failed to furnish a list of the stock in the company, and its value, in accordance with § 32 of the act for the assessment of taxes, (1 R. S. 1852, p. 113,) the auditor of *Laporte* county proceeded to make the assessment. The taxes assessed are for the years 1855, 1856, 1857 and 1858. They are assessed against the appellant, the *Michigan Central Railroad Company*, upon the "value of corporation stock," based upon the length of the road running through the county of *Porter* and *Lake*, but nothing appears in reference to that part running through the county of *Laporte*. It appears, also, that the defendant, *Porter*, as treasurer of *Laporte* county, was about to seize the property of the appellant to make the taxes.

The question presented is, whether the taxes in question were properly assessed against the *Michigan Central Railroad Company*.

By our statute, (see statute above cited,) the stock of a railroad company in this State is to be assessed against the company, and not against the individual stockholders. The term "stock," as used in the statute, includes not only stock

Nov. Term, 1861. subscriptions, but all the actual, tangible property of the company. *The State v. Hamilton*, 5 Ind. 310. The "stock" in that part of the road running from *Michigan City* to the west line of the State, and built by the appellant, we regard as vested in the *New Albany and Salem Railroad Company*, under whose charter it was built. There is, so far as we are advised, no such corporation known to our laws as the *Michigan Central Railroad Company*, to whom stock could be assessed, and the collection enforced in the manner provided by our laws. See statute above cited, § 42. No question is raised, and we make none, in respect to the validity of the agreement between the *New Albany and Salem Railroad Company* and the appellant. Whatever may be the legal effect of that agreement in other respects, it can not be held to transfer the "stock" in the road to the appellant, for the purposes of taxation. Nor need we determine what franchises, if any, a corporation may, and what it may not, transfer. See, however, on this subject, the case of *Coe v. The Columbus, &c. Railroad Company*, 10 Ohio St. R. 372.

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But it is insisted that the tax was properly assessed against the *Central Michigan Railroad Company*, under other provisions of the law. The counsel for the appellees argue as follows:

"Sections 18 and 19, 1 R. S., p. 108, declare that personal property mortgaged or pledged, shall, for the purposes of taxation, be deemed the property of the party who has it in possession, and that the mortgagee of real estate shall be deemed the owner, for the same purpose, after taking possession. The terms real estate and personal property must, with a reasonable view to the object of the act, be taken to include all taxable property; and this case comes so clearly within those provisions, that it seems impossible to make the proposition plainer by argument."

There would be no doubt of the correctness of the position thus assumed, if the road bed was to be assessed as real estate, and the rolling machinery as personal property. But by the provisions of the statute, all are to be assessed as corporation stock. Nothing, in the case before us, was assessed against the appellant for real or personal property, but for

corporation stock. Again, if the assessment could be made as for real and personal property, it must be made in the counties where it is situated. The auditor of *Laporte* county could make no assessment against the appellant for real or personal property situated in the counties of *Porter* and *Lake*, which were the only counties for which the assessment in question was made.

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A question is made by the appellant as to the constitutionality of the law on the subject of taxing corporations, and also as to the regularity of the assessment, but from the foregoing view it will be unnecessary to determine them.

Per Curiam.—The judgment is reversed, with costs. Cause remanded, &c.

James Bradley and *D. J. Woodward*, for the appellant.

John B. Niles, for the appellees.

SWOPE and Others v. FORNEY.

A. and *B.* entered into a contract by which the former agreed to purchase and deliver to the latter one thousand sheep. The contract was reduced to writing, and was signed by *A.*, and by two other persons as sureties for him, but was not signed by *B.* Suit by *B.* against *A.* and his sureties, alleging a failure to deliver the sheep. Answer, by the sureties: 1. That they executed the agreement upon the consideration that *B.* should also execute the same on his part, and that he neither signed the agreement, nor paid the money agreed to be advanced thereon. 2. That *B.* did not notify them of the acceptance of their guaranty, nor that he had given credit thereon.

Held, that the recital in the agreement of the payment of one thousand dollars by *B.*, as part of the consideration of the contract, was not conclusive, but that the fact of the payment might be inquired into.

Held, also, that if the sureties executed the agreement upon the consideration that *B.* should also execute it, and thus become mutually bound with *A.* for the performance of its conditions, they had a right to insist upon its execution by him, or to claim the benefit of his failure.

Nov. Term, *Held*, also, that the pleadings did not make a case in which notice to the
 1861. sureties of the acceptance of the security was necessary.

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APPEAL from the *Putnam* Common Pleas.

HANNA, J.—*Forney* sued upon the following writing:

Tuesday,
 December 10.

“GREENCASTLE, *March* 30, 1860.

“Article of agreement entered into between *B. Swope*, of the first part, and *P. Forney*, of the second part. The provisions of this agreement are as follows: *Swope* agrees to purchase and deliver to *Forney* one thousand sheep, to be in kind, in quality, in age, and in price, as follows: Ten bucks, and one thousand ewes, and the lambs belonging to the ewes; the bucks to be chosen by *Forney* out of the herds of sheep purchased by *Swope*; the quality of the sheep are all to be not less than half blooded merinos, up to full blood, and none over three years old, &c.; the sheep are not to be shorn before the fifteenth of *May*; the number to be full and complete on the day of delivery, &c.; also, the sheep, on driving them in to be delivered to *Forney*, are not to be driven more than ten miles in twenty-four hours, so as not to injure them for their journey to *Texas*; the sheep are all to be delivered and handed over to *Forney*, at ———, from the 20th day of *May*, to the 1st of *June*. *Forney* is to pay for bucks and ewes one dollar and thirty-five cents, each, and for all lambs over four weeks old on the day of delivery, twenty-five cents, each. *Forney* is to advance to *Swope*, on the purchase of said sheep, one thousand dollars; the balance to be paid on the delivery of the sheep. For the consideration of the above one thousand dollars paid to *Swope* by *Forney*, for the faithful fulfillment of the foregoing contract, in the event of a failure on the part of *Swope* to fulfill the contract as specified in its provisions, we, the undersigned, jointly and severally, bind ourselves in this obligation to pay *Forney* the sum of one thousand dollars, with interest, adding thereto all damages and expenses consequent upon the non-performance of the contract. In witness,” &c.

Signed and sealed by *B. K. Swope*, *B. K. Swope, Jr.*, *W. S. Collier*, and *Clinton Wal's*.

The complaint was in four paragraphs:

First. For money had and received.

Second. On the special contract, against all the defendants, as principals, averring a performance by the plaintiff, by the payment of one thousand dollars, and a readiness to receive said sheep at, &c., and pay the balance. That said sheep, if delivered, would have been worth \$3,500; that plaintiff was damaged \$1,000, for moneys laid out, &c.; that *Swope* wholly failed to deliver said sheep, &c.

Third. Against *Swope*, Sr., as principal, and the other defendants as "sureties and guarantors" on the contract, and averring that the sheep were to be delivered at such place as might thereafter be agreed upon, to suit said *Swope*; that they agreed upon *Danville, Illinois*; that plaintiff paid the one thousand dollars, and kept and performed his part of the contract, and was ready, and offered to receive said sheep, and pay for the same; but that *Swope* wholly failed; that at, &c., on, &c., sheep were worth, &c. Wherefore, &c.

Fourth. Similar to the third, averring that the place of delivery agreed upon was *Greencastle*.

Answer in seven paragraphs, on the part of the sureties:

First. That they executed the contract in consideration that plaintiff should also execute the same on his part; and that he neither signed the same, nor paid to said *Swope* the one thousand dollars therein named, previous to the said 25th day of *May*, 1860.

Second. Averring that they executed the contract for the consideration named in the first paragraph of the answer, and for none other, and that plaintiff had wholly neglected to execute the same.

Third. Want of consideration.

Fourth. That plaintiff did not, at any time, pay said one thousand dollars; but that in *April*, &c., without the knowledge or consent of defendants, he paid said *Swope*, in depreciated bank notes, the nominal sum of \$1,000, but of the real value of only \$900, by reason whereof said *Swope* was less able to make said purchases, &c.

Fifth. That the plaintiff did not, on or before *June 1*,

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Nov. Term, 1860, notify said sureties of the acceptance of said guaranty, or of credit being given thereon.

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Sixth. That after the execution of said writing, said plaintiff and said *Swope*, without the knowledge, license or consent of said defendants, changed said agreement, in this, that said *Swope* should deliver said sheep at *Danville*, in the State of *Illinois*, remote from his and defendant's residence, and from the place where the contract was entered into, to wit, seventy-five miles.

Seventh. General denial.

A demurrer was sustained to the first, second, third, fourth, fifth and sixth paragraphs of said answer.

Upon this ruling the first error is assigned. One objection made to the first, second, third and fourth paragraphs was, that they attempted to set up matter in defense which the defendants were estopped by the instrument in writing from setting up, namely, that the one thousand dollars had not been paid to *Swope*; the payment and reception of said sum being acknowledged by the agreement. Is the estoppel apparent on the pleadings? It is insisted by the appellants, who were sureties and defendants, that as to them an admission in the written agreement could not be binding, in reference to the payment to their principal; but if considered binding when made, that in fact no such admission occurs in the instrument. They insist that in consideration of the execution of the writing, and the delivery by *Forney* to *Swope* of one thousand dollars, they guarantied that *Swope* would do certain things; that it was an executory contract, and they are entitled to the rights of guarantors growing out of such a contract; that the failure of the plaintiff to sign the instrument, and advance the money, released them.

It has been often held that the recital in a deed acknowledging the reception of the purchase money, or consideration, is not conclusive. 1 *Greenleaf's Ev.*, § 26, n. 1. And in *Rockhill v. Spraggs*, 9 Ind. 30, it was held that where a deed stated the consideration to be \$300, it might be shown by parol, not only that such sum was not paid, but that in fact the consideration was not the reception of money, but was natural love and affection.

Passing over the question, whether the receipt of the money, in the case at bar, was acknowledged by the writing, we are of opinion, as it was stated to be a part of the consideration for the execution of said writing, that the writing is not conclusive upon the subject. The truth may be inquired into. See, upon this point, *McCrea v. Purmort*, 16 Wend. 460; *Capp v. Tirrell*, 20 Pick. 247-250; *Meeker v. Meeker*, 16 Conn. 383; *Geddis v. Hawk*, 1 Watts, 280; *Mehaffy v. Dobbs*, 9 *id.* 363-379; *Good v. Good*, *id.* 567; *Lewis v. Bradford*, 10 *id.* 68. See, also, *Doe v. Oliver*, and *Duchess of Kingston's case*, 2 Smith's Lead. Cases, pp. 417, 424, and many authorities referred to in notes.

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As to the first and second paragraphs of the answer, appellants insist that what might be the respective rights and liabilities of the parties to this instrument, signed as it is, in the absence of any special agreement on the subject, can not be a question, because they there aver that it was agreed that it should be signed by the plaintiff; that it was executed by them upon the sole consideration that it should be executed, and its stipulations complied with, by him; that they had the right to make their execution depend upon that of the other party, and that there was a failure of consideration consequent upon his failure to execute, &c.

To this it is answered, in argument, that it is only necessary for the party to be charged to sign; and we are referred to *Smith v. Smith*, 8 Blackf. 208, and *Shirley v. Shirley*, 7 *id.* 452.

At common law, the contract here sued on would have been binding if made by parol. But as it was in reference to matters and sums which fall within the statute of frauds, that, and adjudications under it, should govern, unless it is shown that the appellants attempted to relieve themselves, or rather to guard against the same. In a leading case in *England*, on this point, *Laythoarp v. Bryant*, 2 Bingh. N. C. 735, it is said: "Unless the plaintiff signs, there is a want of mutuality. Whose fault is that? The defendant might have required the vendor's signature to the contract." Does it sufficiently appear by the pleadings that these defendants did require the plaintiff's signature?

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As before stated, it is expressly averred in the answer that the appellants executed the writing upon the sole consideration that the plaintiff was to execute it, and to pay the one thousand dollars, and that he had done neither. The pleadings show that the plaintiff was a resident of *Pennsylvania*, and that the sheep were to be driven to *Texas* by him; that the defendants were residents of *Putnam* county, in this State, and that other sums were to be paid on the contract, if fulfilled by plaintiff. There were strong reasons, therefore, for requiring that he should be bound, as well as the party here charged; and we are not able to perceive any valid reason why the appellants might not require him to sign, as well as their principal. If, in point of fact, they did execute upon the express understanding, or consideration, that the plaintiff was to become mutually bound, it would appear but right that they should insist upon the performance upon his part; or be permitted to claim the benefit of his failure, if such failure does result to their benefit. The demurrers should have been overruled.

The demurrer was properly sustained to the fifth paragraph of the answer. We do not believe that the pleadings make a case in which any such notice as that named in said paragraph was necessary.

As to the sixth paragraph, the demurrer was correctly sustained, because it professed to be an answer to the whole complaint, when in fact it was addressed to the facts set up in the third paragraph alone.

The conclusion on the questions presented on the demurrers, makes it unnecessary to look to the ruling on the motion for a new trial.

Per Curiam.—The judgment is reversed, with costs. Cause remanded, &c.

D. R. Eckels, John A. Matson and J. A. Scott, for the appellants.

Williamson and Daggy, for the appellee.

WILSON and Another v. RYBOLT.

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A title deed is a personal chattel, but is so connected with, and essential to, the ownership of real estate, that it descends with it to the heir.

The possession of title deeds may be recovered in the action provided by the code for the recovery of personal chattels; and as the jurisdiction of justices of the peace, as to the character of the articles of property sought to be recovered, is equally extensive with that of the higher courts, title deeds may be recovered in an action of replevin in a justice's court.

APPEAL from the *Decatur* Common Pleas.Wednesday,
December 11.

PERKINS, J.—Suit before a justice of the peace to recover possession of personal property, viz., a certain title deed to a lot of ground. Judgment for the plaintiff, on appeal to the Common Pleas. The first question is, whether a title deed can be recovered in this form of action.

A title deed is a personal chattel; but like the log chain of a saw mill, or certain other fixtures, it is so connected with, and essential to, the ownership of real estate, that it descends with it to the heir. Blackstone's Comm. Book 2, p. 427; *Hoskins v. Tarrence*, 5 Blackf. 417.

From a very early period chancery compelled the delivery of title deeds where necessary. Blackstone's Comm., Shar's Ed., Book 3, p. 153, note. Later they became recoverable in an action of detinue. Chitty, in his work on Pleadings, (vol. 1, p. 122,) says, detinue "lies for the recovery of charters and title deeds," &c. See *Atkinson v. Baker*, 4 Term Rep. 430.

Now, what was the action of detinue? Blackstone, in his Commentaries, (Book 3, p. 151,) thus describes its incidents: "In order, therefore, to ground an action of detinue, which is only for the *detaining*, these points are necessary.

1. That the defendant came lawfully into possession of the goods, as either by delivery to him; or finding them.
2. That the plaintiff have a property.
3. That the goods themselves be of some value; and,
4. That they be ascertained in point of identity.

Upon this the jury, if they find for the plaintiff, assess the several values of the parcels detained, and also damages for the detention; and the judgment is

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conditional; that the plaintiff recover the said goods, or, (if they can not be had,) their respective values, and also the damages for detaining them?"

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Such was the common law action of detinue; and as it was an action for the recovery of personal property only we must hold that whatever could be recovered by it was regarded, for the purposes of this civil remedy, as personal property. The action of replevin, at common law, was originally of a more limited character. It lay to recover back property illegally distrained; but it afterward came into use in all cases where personal property was illegally taken. The two actions of detinue, for unlawful detentions, and replevin for unlawful takings, thus came to cover the whole ground of unlawful deprivations of personal property, so far as recovering the specific articles was concerned. 1 Chit. Pl. 162, 164.

These two actions, viz., detinue, and replevin, in their fullest scope, were formerly in use in this State. Ind. Dig., p. 46, *et seq.*; see Will. on Per. Prop., top p. 42. And it will be seen at a glance, by inspecting the provision in the code for the recovery of personal property, that it covers the entire ground of both actions. That provision is, (§ 128,) "when any personal goods are wrongfully taken, or unlawfully detained," &c. The jurisdiction of justices of the peace, as to the character of articles of property, is equally extensive. 2 R. S., § 71, p. 464.

The conclusion irresistibly follows, that the possession of title deeds may be recovered in the action under the code for the recovery of personal chattels. If title deeds can not be recovered in this action, how can they be recovered at all? The possession of deeds of conveyance of real property is of much less consequence in this country than it formerly was in *England*, because of our recording acts. The public records of conveyances disclose to purchasers, in most cases, the true condition of the title to real estate. In *England*, before registration acts were passed, (and now, in the portions of it where they are not in force,) the possession of the complete chain of title deeds was the evidence which the seller produced of his ownership; and, on a sale, the entire

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series of deeds passed to the purchaser, so that the seller should have no evidence of title remaining, whereby he might be able to effect a second and fraudulent sale. Hence, on a purchase of land in *England*, we discover a valid reason why an abstract of title, accompanied by the deeds constituting the links in the chain, should be furnished. Will. on Real Prop., side p. 370, *et. seq.*

But though the possession of deeds has become of less importance, the legal right to it is not probably changed; and even if it is as to prior deeds, it still remains as to the deed of the immediate grantor of the plaintiff.

The second question made in the case is, whether the evidence established a right in the plaintiff to the deed sued for. The bill of exceptions does not contain the words, "this was all the evidence given in the cause."

As the plaintiff recovered below, we must, in the absence of the evidence, presume in favor of the judgment.

Per Curiam.—The judgment is affirmed, with costs.

DISSENTING OPINION.

HANKS, J.—I can not agree with the majority opinion.

This was an action commenced before a justice of the peace, for the recovery of a specific article of property named in the complaint, viz., a deed of conveyance of land. *Rybolt* was plaintiff, *Hanks* and one *Wilson* defendants. The plaintiff recovered before the justice, and also in the Common Pleas.

The first question is, whether an action in this form, to recover title deeds, can be maintained.

It is evident that this action was commenced under § 71 of the act in relation to the duties of justices of the peace, 2 R. S., p. 464: "Whenever any plaintiff shall, by complaint in writing verified by affidavit, set forth that his personal goods, not exceeding in value one hundred dollars, have been wrongfully taken, or are unlawfully detained, by any other person, specifically describing such property, and giving the value thereof," &c. This action is in the nature, and takes the place under the statute, of the old action of replevin;

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and, indeed, is intended as a substitute for all the old forms of action for the recovery of specific articles of property, so far as the justice has jurisdiction. The justice's jurisdiction is statutory, and in this instance is derived from the statute quoted. Does the term "personal goods" include title deeds to lands? We have a statute, that words shall receive their ordinary signification, unless they have some particular legal, technical meaning. 2 R. S., p. 339. "Goods. 1. Movable; household furniture. 2. Personal or movable estate, as horses, cattle, utensils, &c. 3. Wares; merchandise; commodities bought and sold by merchants and traders." Webster's Dict. "Movables; wares; merchandise." Baily's Dict. "Movables in a house; wares; freights; merchandise." Walker's Dict. The ordinary, plain and usual sense of the words used in the statute would not, according to the above authorities, embrace title deeds.

We will next examine as to whether they have a technical import in law. "Goods; property. For some purposes this term includes money, valuable securities, and other mere personal effects." Bouvier's Law Dict., vol. 1, p. 387. *Blackstone* says, Bk. 2, p. 385, "But things personal, by our law, do not only include things movable, but also something more; the whole of which is comprehended under the general name 'chattels,' which Sir *Edward Coke* says is a French word signifying 'goods.'" From this text it is insisted that the term, "personal goods" has a legal technical meaning, and that that meaning would include title deeds, or the box in which they are kept, because such are sometimes embraced by the term "chattels." Bouvier's Law Dict., vol. 1, p. 224; 2 Kent's Comm. 342. But even that term is not, by some authors, made to include title deeds. Jacobs' Law Dict. vol. 1, p. 447. Nor are the two terms, by every author, treated as of like import. "Chattels is a more extensive term than goods or effects." Bouvier, pp. 224, 563. But whether title deeds are included in the general term "chattels," and whether the word "*goods*" and the word "*chattels*" are equivalent terms in law, it is not necessary to decide, for the reason that "there are many chattels which, though they be even of a movable nature, yet being necessarily attached

to the freehold, and contributing to its value or enjoyment, go along with it in the same path of descent or alienation. This is the case with the deeds and other papers which constitute the muniments of title to the inheritance." 2 Kent, 342; Blackstone, Book 2, p. 48^o, n. 7. See, also, 1 Bibb. 333; 3 Mass. 487; 5 *id.* 472. This must have been the view taken of the question by our law makers in framing our criminal statutes, at the same session of the Legislature at which the statute was enacted which governs this case; for, after framing a general section upon the subject of the larceny of "personal goods," (2 R. S., § 19, p. 403,) they then, (§ 24, p. 40^o,) proceed to frame another section, which declares that certain things shall be considered as "personal goods," of which larceny may be committed. Among the enumerated articles is, "any deed or writing containing a conveyance of land." Why the necessity of this latter section, if the deed or writing was already included in the former section, under the general term "personal goods"?

If the plaintiff, in the case at bar, had a right to the possession of the title deed in controversy, but before obtaining that possession had died, that right would have descended to the heir, and not to the personal representative; and although it would have been the duty of such representative to reduce to possession and administer the personal estate of the deceased, yet he could not have recovered the deed as a part of that personal estate.

Whether this action might, even in the form it is presented, have been originally commenced in a court having a general, and formerly a chancery, jurisdiction, we do not decide; but certainly the justice of the peace had no jurisdiction to grant the relief sought.

Gavin and *Coverdill*, for the appellants.

Scobey and *Cumback*, for the appellee.

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v.
RYAN.

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1861.

BINGHAM

v.

KIMBALL.

BINGHAM v. KIMBALL.

Suit against *A.* upon a promissory note, as follows, "Due on demand to *B. & Co.*, eleven hundred and four $\frac{60}{100}$ dollars, balance on lumber furnished the State Fair Grounds." (Signed,) "*A.*, Superintendent." Answer: that the note was given for the price of certain lumber, which the payees had before that time sold and delivered to the *State Board of Agriculture*, and was signed by the defendant as superintendent of said board, for the purpose of liquidating the debt, and as the note and obligation of said board, not for the purpose of binding defendant, and for no other consideration, &c.

Held, that the note having been given for a claim which the payees already had against the *State Board of Agriculture*, and without any new consideration, was *nudum pactum*; the previous indebtedness of the board to the payees not being, of itself, a sufficient consideration to support the promise of *A.* to pay the debt.

A want of consideration can not, under the code, be given in evidence under the general denial, as it formerly could under the general issue.

Wednesday,
December 11.

APPEAL from the *Marion* Circuit Court.

WORDEN, J.—Suit by *Kimball*, as assignee, against *Bingham*, as maker, of the following note:

"\$1,104.60

LAFAYETTE, July 6, 1854.

"Due on demand to Messrs. *W. F. Smith & Co.*, eleven hundred and four $\frac{60}{100}$ dollars, balance due on lumber furnished the State Fair Grounds.

(Signed,) "J. J. BINGHAM, *Superintendent.*"

A demurrer was sustained to the following paragraph of the answer, and final judgment rendered for the plaintiff: "The defendant, for a further answer to the complaint, says, that the note sued on was executed for the consideration following, that is to say: that plaintiff's assignors (the payees of the note) had sold and delivered to the *Indiana State Board of Agriculture* a large amount of lumber, for the use of said board in the preparation and inclosure of the fair grounds; that said *Smith & Co.* had contracted with the defendant for the sale of such lumber as the agent of said board, whose agent he was, and had charged the same to said board, and not to the defendant; that the note sued

on was executed for the purpose of liquidating said account, and was signed by the defendant, not by his usual signature, but as "superintendent," meaning thereby, as was well understood by said *Smith & Co.*, *Superintendent of the State Board of Agriculture*; that said note was delivered to the plaintiff's assignors, and received by them, not for the purpose of binding the defendant, in any event, to the payment of the same, but as the note and obligation of the *State Board of Agriculture*, whose obligation it in fact is, said defendant being authorized to bind said board; that said board has paid on said note the sum credited, and are liable to pay the residue, and not this defendant; that *Joseph A. Wright*, the then president of said board, upon the presentation of the same by said *Smith & Co.*, acknowledged the said note as the obligation of said board."

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v.
KIMBALL.

If this answer be regarded as merely showing that the note sued on should be construed to be the note of the *Indiana State Board of Agriculture*, a corporation created by a law of this State, and not the note of the defendant, it would probably be defective. *Mears et al. v. Graham et al.*, 8 Blackf. 144. But we think the facts set up show a substantial defense to the action, viz., that the note was given without any sufficient consideration to support it. The consideration is averred to have been the *previous* sale and delivery of lumber to the *Indiana State Board of Agriculture*. The defendant acted as the agent of the corporation in purchasing the lumber, but if, as averred, he was authorized by the corporation, and if the lumber was sold and furnished to the corporation, and not to the defendant, no debt was created as against him. The case is made no stronger against the defendant by the fact that the corporation made the purchase through him as her agent. He stands, thus far, in the same position as if the purchase had been made through any other agent. The case then is simply this: the payees of the note had a claim against the *Indiana State Board of Agriculture*. For this claim, without any new consideration whatever, the defendant executed his individual note. This is, in substance, though not in form, a promise to answer for the debt of another. Had

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the note been given concurrently with the creation of the original debt, and as part of that transaction, the case might have stood differently; but as it is, we think it clear that the contract is *nudum pactum*.

Some authorities on this point may be noted. In *Leonard v. Vredenburg*, 8 Johns. 29, 39, Chancellor *Kent* says: "There are, then, three classes of cases on this subject, which require to be discriminated: 1. Cases in which the guaranty or promise is collateral to the principal contract, but is made at the same time, and becomes an essential ground of the credit given to the principal or direct debtor. Here, as we have already seen, is not, nor need be, any other consideration than that moving between the creditor and the original debtor. 2. Cases in which the collateral undertaking is *subsequent* to the creation of the debt, and was not the inducement to it, though the subsisting liability is the ground of the promise, without any distinct and unconnected inducement. Here must be some further consideration shown, having an immediate respect to such liability, for the consideration of the original debt will not attach to this subsequent promise." In a note to *Smith on Cont.*, top page 119, 4 Am. Ed., it is said that "Where the promise is given *subsequently* to the creation of the debt, it is evident that the mere existence of the debt can not, even at common law, be a sufficient consideration for the promise." *Vide*, also, *Browne on Stat. Frauds*, § 191. *Birkmyr v. Darnell*, and note, 1 *Smith's Lead. Cases*, p. 134.

The payees of the note lost nothing by thus taking it. Their claim against the corporation was not thereby extinguished. *Tyner v. Stoops*, 11 Ind. 22. Had their claim against the corporation been extinguished by the taking of the note of the defendant, that might, perhaps, have furnished a sufficient consideration for the note. There might, undoubtedly, be a new consideration growing out of, or connected with, the original indebtedness, which would be sufficient. Such, perhaps, as an agreement to give further time to the original debtor; an agreement not to sue, or to dismiss a suit already brought; a placing of property by the original debtor, into the hands of the party making the new

promise; and other cases that might be suggested. Nothing of the kind, however, comes in, in the present case, to furnish a consideration for the note sued upon. It depends solely upon the previous indebtedness of the corporation to the payees of the note, and this is not sufficient. The demurrer should have been overruled.

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HUGHES
v.
McDOUGLE.

It is suggested by counsel for the appellee, that the defense could have been given in evidence under the general denial, on which the cause was tried, and therefore that the ruling on the demurrer, if wrong, did no harm. A want of consideration can not be given in evidence under the general denial, as it formerly could under the general issue.

Per Curiam.—The judgment is reversed, with costs. Cause remanded, &c.

R. L. Walpole, J. E. McDonald and A. L. Roache, for the appellant.

John L. Ketcham, for the appellee.

HUGHES and Others v. McDUGLE and Others.

Where there has been a special finding by the Court below, and such finding, together with the evidence upon which it was based, is set out in the record, it is not necessary that "all the evidence given in the cause" should be set out, in order to determine the correctness of the special finding.

Where there is a special agreement, or direction, as to the application of payments made by a debtor to his creditor, they must be so applied, unless a different appropriation is made by consent of the parties.

APPEAL from the *Decatur* Common Pleas.

Wednesday,
December 11.

WORDEN, J.—Action by the appellants against the appellees, *Henry McDougale* and *James and Joseph De Armond*, upon several promissory notes made by the defendants as partners, under the name of *McDougale, De Armond & Co.*, to the plaintiffs. The notes sued upon range, in date, from *May 30* to *September 10, 1860*, and amount to \$374.08.

Nov. Term, Issue; trial by the Court, and finding and judgment for the
1861. plaintiffs, for \$90.15.

HUGHES
v.
McDOUGLE.

The plaintiffs appeal. The question presented arises upon the special finding of the Court, in connection with the evidence upon which the finding was based. It is objected that all the evidence can not be considered as in the record; the bill of exceptions not stating, in the language of the 30th rule, that "this was all the evidence given in the cause."

A bill of exceptions sets out the finding of the Court, and the evidence on which it was based; hence it is not necessary that the record should contain all the evidence, in order to determine the correctness of the special finding.

The following are the substantial facts on which the special finding was based:

On April 17, 1860, the firm of "*J. De Armond & Brother*" executed their promissory note to the plaintiffs, payable in six months, for the sum of \$97.76. Afterward, the firm of "*McDougle, De Armond & Co.*" was formed, who executed to the plaintiffs the notes sued upon. Still later, another firm was formed, that of "*J. De Armond & Co.*," composed of *Thomas, John* and *Joseph De Armond*. The firm of *McDougle, De Armond & Co.* sold out their stock of goods to the firm of *J. De Armond & Co.*, the latter agreeing to pay the debts of the former firm.

The plaintiffs holding the note against *J. De Armond & Brother*, for \$97.76, and the notes sued upon, and another against *McDougle, De Armond & Co.*, amounting in all to \$736.36, this sum was divided into three equal parts, for which *J. De Armond & Co.* executed to the plaintiffs three several promissory notes, payable in bank, at thirty, sixty and ninety days. These notes were not received by the plaintiffs in satisfaction of the former notes against the other firms, but it was agreed that when they were paid, the payments should be applied, first, to the satisfaction of the note against *J. De Armond & Brother*, for \$97.76, and then to the notes against *McDougle, De Armond & Co.* Payments were made at different times by *J. De Armond & Co.*, on the notes thus given by them, but no express

appropriation appears to have been made, either by them or by the plaintiffs, different from the terms agreed upon.

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1861.

The Court found from the evidence that there was due the plaintiffs, on the notes in suit, the sum of \$202.16, if the payments proved be applied first to the note of *De Armond & Brother*, and the residue on the notes sued on; but if the payments proved be all applied to the notes sued upon, then there was due the plaintiffs only \$90.15. For the latter sum the Court rendered judgment for the plaintiffs; thus determining that as a question of law arising on the facts stated, the payments should be applied wholly to the notes in suit.

HUGHES
v.
McDOUGLE.

We are of opinion that the ruling was wrong, because it was against the express terms of the contract, if not against the law, in the absence of such express stipulations. As to the law, in the absence of express agreement as to the appropriation of payments, see Story on Part., § 157.

We have seen that by the express terms of the agreement the payments were to be applied, first, to the debt against *De Armond & Brother*. The payments made ought to be applied as agreed upon, unless a different appropriation was made by consent of parties, which does not appear to have been the case.

But the appellees insist that the plaintiffs rescinded the contract by bringing suit upon the original notes, and therefore are not entitled to the benefit thereof, in regard to the application of payments. This suit was not brought until after the notes given by *J. De Armond & Co.* had all matured. Upon their non-payment at maturity, the plaintiffs had a right to sue on the original notes, and in doing so they neither violated nor rescinded the agreement. That agreement was that payments made by *J. De Armond & Co.* should be applied in a particular manner, and the plaintiffs have done nothing, that we can discover, which should prevent the application being made accordingly.

There is no necessity for a new trial in the cause, the Court having found sufficiently the amount due the plaintiffs, applying the payments made, first, to the note of *J. De Armond & Brother*. This amount we have seen was \$202.16, for which judgment should have been rendered.

Nov. Term, 1861. The plaintiffs moved for judgment for this amount, on the finding, but the motion was overruled, and they excepted.

CASTLE
v.
FULLER. *Per Curiam*.—The judgment is reversed, with costs, and the cause remanded, with instructions to the Court below to render judgment in favor of the plaintiffs for two hundred and two dollars and sixteen cents, with interest thereon from the time of the finding.

J. S. Scobey, for the appellants.

B. W. Wilson, for the appellees.

CASTLE v. FULLER and Others.

On April 2, 1849, a judgment was recovered against *A.*, in a prosecution for bastardy, for \$265, which was directed by the Court to be paid in installments, running through a period of twelve years. *B.* became replevin bail upon the judgment, and afterward, in 1855, sold and conveyed to the plaintiff a tract of land owned by him in the county. On May 14, 1860, an execution was issued upon the judgment, and levied upon the land so sold by *B.* Suit to enjoin the sale.

Held, that ten years having elapsed after the recovery of the judgment, and before the issuing of the execution, and the plaintiff not having been prevented from proceeding thereon, during any portion of such time, "by the operation of any appeal, or writ of error, or by the injunction of any judge or court," the lien of the judgment was discharged.

Wednesday,
December 11.

APPEAL from the Warrick Circuit Court.

WORDEN, J.—On April 20, 1849, in the Warrick Circuit Court, the State, on the relation of *Martha Stinson*, recovered a judgment against *Harrison M. Lemasters*, for the sum of \$265, in a prosecution for bastardy. This sum was ordered by the Court to be paid in the following installments, viz., twenty-five dollars within thirty days after the child should be born; and twenty dollars each year, for the term of twelve years, from and after January 1, 1850.

On this judgment, *Simeon Lemasters* entered himself as replevin bail. Afterward, in 1855, *Simeon Lemasters* being

the owner of certain real estate, sold and conveyed the same to the plaintiff. Nov. Term,
1861.

On *May* 14, 1860, an execution issued on the judgment for a balance then due of \$64.80, which the sheriff levied upon the above mentioned real estate, and advertised the same for sale. On these facts, the plaintiff filed his complaint to enjoin the sale, making the sheriff, *Fuller*, a party, as also the said *Martha* and her husband, she having intermarried with *Larkin Floyd*.

CASTLE
V.
FULLER.

A demurrer was sustained to the complaint, because it did not contain facts sufficient, &c.

The plaintiff not amending, final judgment was rendered against him, and he brings the cause up for revision.

The question arising on the complaint appears to be, whether the property thus sold by *Simeon Lemasters* to the plaintiff was, at the time of the issuing of the execution and the levy thereof, bound by the lien of the judgment. The lien of a judgment upon real estate expires at the end of ten years from the rendition thereof; but "the time during which the party recovering such judgment or decree shall be restrained from proceeding thereon by the operation of any appeal, or writ of error, or by the injunction of any judge or court, shall not constitute any part of the term of ten years." R. S. 1843, § 7, p. 455. See, also, 2 R. S. 1852, § 527, p. 154.

Here, the ten years had expired after the rendition of the judgment, and before the issuing of the execution, and in the meantime the property had been conveyed to the plaintiff. The plaintiff would, without doubt, have held the property subject to the lien, had the execution issued and been levied within the ten years; but as it is, the lien is discharged, unless the case comes within the statute providing what time shall not be deemed a part of the ten years. Proceedings on the original judgment were not restrained by operation of any "appeal, or writ of error," nor do we think the case comes within the meaning of the clause, "the injunction of any judge or court." The term "injunction" has a technical, legal import, and without undertaking to define specially what it is, we think it is clearly not a fixing of the

Nov. Term, 1861. time by the Court, in a prosecution for bastardy, when the putative father is required to pay money on the judgment rendered for the support of the child.

FRYBARGER
v.
COCKEFAIR.

We are of opinion that upon the facts stated, the lien of the judgment had expired; and, consequently, that the demurrer should have been overruled.

Per Curiam.—The judgment is reversed, with costs. Cause remanded, &c.

James G. Jones and J. E. Blythe, for the appellant.

FRYBARGER v. COCKEFAIR.

In a suit against the assignor of a promissory note, not payable in a bank in this State, the complaint must show that diligence has been used against the maker, or some excuse for the want of diligence.

Under the code, want of consideration for a written instrument, of the class which *prima facie* imports a consideration, as the indorsement of a note, must be specially pleaded; and evidence of a want of consideration can not be given, in such case, under the general denial.

Wednesday,
December 11.

APPEAL from the *Fayette* Circuit Court.

PERKINS, J.—A promissory note was made as follows:

“\$1060.

CONNERSVILLE, *February 9, 1858.*

“Twelve months after date, we promise to pay to the order of *W. W. Frybarger*, one thousand and sixty dollars, for value received, without relief from valuation or appraisement laws, &c.

(Signed) “SHERMAN SCOFIELD,
“JESSE HATTON.”

This indorsement was made thereon:

“I assign the within to *E. Cockefair*, for value received.
“W. W. FRYBARGER.”

The above note fell due, *February 9, 1859.* *Cockefair*, the assignee, commenced suit upon it, *August 22, 1859*, and

obtained judgment on *January* 21, 1860, in the *Fayette* Circuit Court. The makers had become insolvent, and the money was not made, and now *Cockefair*, the assignee, sues *Frybarger*, the assignor, upon his assignment. In his complaint he showed neither diligence, nor an excuse for the want of it, and hence the complaint was bad. How far it might be cured by reply, see *Reilley v. Rucker*, 16 Ind. 303. *Frybarger* answered that the assignment of the note by him to *Cockefair* was without any consideration, paid, or to be paid. To this answer the Court sustained a demurrer. In this the Court erred. Appellee's counsel contend that the error, if it be such, should not reverse the case, because evidence of want of consideration might have been given under the general denial. We think such evidence could not have been given under the general denial. The suit was upon the assignment, a *prima facie* cause of action. Under the new code, want of consideration for a written instrument, of the class which, *prima facie*, imports a consideration, must be specially answered.

Per Curiam.—The judgment is reversed, with costs. Cause remanded for further proceedings, with leave to amend, &c.

Jno. S. Reid, for the appellant.

B. F. Claypool and *L. Develin*, for the appellee.

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1861.

MYERS
v.
PEARSOLL.

MYERS v. PEARSOLL.

APPEAL from the *Laporte* Common Pleas.

Wednesday,
December 11.

Per Curiam.—Notice of an intended application for his removal was given to a guardian. He appeared in Court, and was present when the order of removal was made. He took no exception.

The judgment is affirmed, with costs.

James Bradley and *D. J. Woodward*, for the appellant.

S. Major, for the appellee.

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1861.

STEVENSON and Another v. GOULD and Another.

DEAN

v.

PHILLIPS.

Wednesday,
December 11.

APPEAL from the *Tippecanoe* Common Pleas.

Per Curiam.—The Court of Common Pleas has jurisdiction of sums over one thousand dollars. *Kiger v. Franklin*, 15 Ind. 102.

The judgment is affirmed, with 3 per cent. damages and costs.

R. C. Gregory, for the appellants.

H. W. Chase and *J. A. Wilstach*, for the appellees.

DEAN v. PHILLIPS.

A. had recovered a judgment for the foreclosure of a mortgage against *B.* and wife, for \$986, and afterward two other judgments, amounting to \$1,014, were recovered by other parties against *B.* and *C.*, as partners. Executions upon the judgment of foreclosure, as well as upon the other judgments, were placed in the hands of the sheriff, who levied the latter upon the mortgaged premises, and having duly advertised the premises, sold the same upon the decree of foreclosure to *A.*, for \$2,105, who refused to pay the purchase money, a deed having been tendered. Motion, under § 476 of the code, for judgment against *A.* for the amount of his bid, and for damages thereon. Answer: that the premises sold were the separate property of *B.* and wife, and that the debts for which the other judgments were recovered were the co-partnership debts of *B.* and *C.*, and that said co-partners had sufficient partnership property in the county out of which to make said judgments; that defendant had tendered to the sheriff the costs due on the order of sale, and his, defendant's, receipt for the amount due to him as plaintiff in said decree of foreclosure, and also the receipt of *B.* for the residue.

Held, that the executions against *B.* and *C.* might lawfully be levied upon the property of either, and having been levied upon the premises mortgaged to *A.*, the overplus, after paying the mortgage debt, was applicable to the payment of the other executions, and hence the receipt of *B.* for such overplus was not a good tender to the sheriff.

Held, also, that the premises having been sold upon the foreclosure of a mortgage, in the execution of which *A.*'s wife had joined, her interest in

the land was gone, and the surplus arising from the sale belonged to *A.*, Nov. Term, and was applicable to the payment of his debts. 1861.

Held, also, that the creditors of a firm may collect their debts out of the property of the one partner, notwithstanding there may be joint property out of which the debt might be made, unless that partner has separate creditors who are entitled to be first paid out of such assets. DEAN v. PHILLIPS.

APPEAL from the *Wells* Circuit Court.

Wednesday,
December 11.

WORDEN, J.—This was a motion by *Phillips*, as sheriff of *Wells* county, against *Dean*, under the provisions of § 476 of the code, for judgment against *Dean* for the amount of a bid made by him on property sold to him on execution, and damages thereon. The facts stated in writing as the ground of the motion are as follows: *Dean* had recovered a judgment for the foreclosure of a mortgage on certain real estate, against *Robert C. Bennett* and his wife, for about \$986, and costs. Afterward, *Lightfoot* and others recovered judgment against *Robert C. Bennett* and *William H. Dean* for about \$224. *Bostwick* and others also recovered judgment against *Bennett* and *William H. Dean* for about \$790. These judgments were recovered subsequently to the execution of the mortgage foreclosed. An execution was issued upon the judgment of foreclosure, as also upon the other judgments, and placed in the hands of *Phillips*, as sheriff, for service, who levied them upon the mortgaged premises, and, having duly advertised the same, sold them on the execution issued upon the judgment of foreclosure. The defendant, *John A. Dean*, plaintiff in the foreclosure case, bid off the premises at \$2,105, but fails and refuses to pay the purchase money, a deed having been tendered, &c.

The defendant answered by general denial, and by two special paragraphs, to which demurrers were sustained, and he excepted. The general denial being withdrawn, the plaintiff had judgment.

As the appellant relies upon only one of the special paragraphs of his answer, that alone will be noticed. That paragraph is as follows:

“And for a third and further answer the defendant says, that the premises in the notice named was the separate property of *Robert C. Bennett* and his wife; that the

Nov. Term,
1861.

DEAN
v.
PHILLIPS.

defendant is the same *John A. Dean* named in the order of sale as plaintiff, and that the debts due on the executions to *Lightfoot* and others, and to *Bostwick* and others, named in the notice, are due from said *Robert C. Bennett* and *William H. Dean* as partners, under the name of *Bennett & Dean*; that *Bennett & Dean* had sufficient partnership property out of which said partnership debts could have been paid, within the bailiwick of said plaintiff, subject to levy on said executions named; that the defendant had the said land struck off to himself at the sum of \$2,105, and the defendant paid the plaintiff, in money, the fees on said order of sale, amounting to \$200, and tendered the plaintiff his, defendant's, receipt, as plaintiff in said order of sale, for \$1,000, part and parcel of said sum of \$2,105, and tendered plaintiff said *Robert C. Bennett's* receipt for \$1,000, the residue of said purchase money, and demanded a deed from the plaintiff, which the plaintiff refused, and still refuses."

Leaving out of view any questions as to the rights of the wife of *Bennett*, and as to the right of having partnership property first applied to the payment of partnership debts, there can be no doubt but that the sheriff was entitled to have the excess of the purchase money bid for the property, after satisfying the judgment on the mortgage, paid over to him, in order that he might apply it on the other executions in their order. *Steele v. Hanna*, 8 Blackf. 326. The defendant's receipt was good enough for the amount coming to him on his execution, but not so with the receipt of *Robert C. Bennett*. Had the overplus, after paying the judgment on the mortgage, not been liable to be applied upon the other executions, perhaps *Bennett's* receipt would have been sufficient. The executions against *Bennett & Dean* might be lawfully levied upon the property of either, and having been levied upon the premises mortgaged, the overplus, after satisfying the mortgage debt, was applicable to the payment of those executions. Hence *Bennett's* receipt was of no consequence. But the appellant insists upon two points, one of which is, that as *Bennett's* wife had an interest in the land mortgaged and sold, she was interested in the

money arising from the sale, after paying the mortgage debt, and therefore it could not be applied to the payment of the other executions. The other point is, that the partnership property should have been first levied upon, and therefore no part of the money arising from the sale in question should have been applied to the payment of the other executions.

We do not perceive how *Bennett's* wife had any interest in the residue of the money, after paying the mortgage debt. She executed the mortgage with her husband; otherwise, had she survived him, she might have been entitled to one third of the land. But the premises having been sold upon the mortgage, to which she was a party, her right to, or contingent interest in, the land was gone. The excess of the money arising from the sale, clearly, all belonged to *Bennett*, and not to his wife; hence it might properly be applied to the payment of his debts.

In regard to the second point, it may be observed that it is settled in equity that upon the dissolution of a partnership by the death or bankruptcy of one of its members, the joint creditors are entitled to priority of payment out of the joint effects, and the separate creditors of each partner out of the separate effects of the partner. *Matlock v. Matlock*, 5 Ind. 403; *Holland v. Fuller*, 13 Ind. 195; 1 Story's Eq. Jur., § 675.

It may be doubtful, however, whether this principle is at all applicable in cases where the partnership still exists, (as it does, for aught that appears, in the present case,) and is not dissolved by death or bankruptcy. *Vide* Story on Part., § 361. But however this may be, it is clear that the principle has no application to the case at bar.

The creditors of a firm may collect their debts out of the property of one of its members, unless that member has separate creditors who are entitled to be first paid out of his separate effects. If there be no such separate creditors, no one's equitable rights are interfered with by the levy on such separate effects. So far as the partner himself is concerned, his separate property is equally liable with the joint property, both in law and equity, for the payment of the joint debts. Partnership debts are regarded in equity as joint and several.

Nov. Term,
1861.

DEAN
v.
PHILLIPS.

Nov. Term, 1861. **TENBROOK** v. **BROWN.** The rule above stated was not established for the benefit of the partners, but for the benefit of their creditors. Now, in the case at bar, no creditors of *Bennett* are asserting their right to be first paid out of his separate property. Indeed, it does not appear that he has any separate creditors. The paragraph of the answer does not even allege that the defendant was the creditor of *Bennett*, and that he made the arrangement and procured *Bennett's* receipt in order to secure his debt.

We perceive no error in sustaining the demurrer.

Per Curiam.—The judgment is affirmed, with 1 per cent damages and costs.

M. Jenkinson, for the appellant.

TENBROOK v. BROWN.

17	410
184	70
17	410
146	520
17	410
151	383
17	410
171	48

A demurrer in the following form, viz., "Comes now said plaintiff and demurs to the second paragraph of the defendant's answer, and says that the same is not sufficient in law to enable the defendant to sustain his said defense, or to bar the plaintiff's complaint," is bad, as no statutory cause of demurrer is assigned.

Suit by a distributee of a testator, against the son and executor of the testator, to obtain distribution of certain personal property claimed by the son by gift from the father, in his lifetime. The plaintiff asked the Court to instruct the jury, that if the property was in the possession of the son as agent for his father, before the time the gift is claimed to have been made, and no apparent change of ownership took place, there was no valid gift; which the Court modified, by striking out the words, "there is no valid gift," and inserting the words, "it is evidence tending to prove that there was no valid gift."

Held, that the instruction, as asked, was properly refused, and that as given, it was as favorable to the plaintiff as he could legally ask.

The delivery of a chattel is necessary to pass the title by gift, but the delivery must be according to the nature of the thing given; and if the property is at the time of the gift in the possession of the donee, as agent for the donor, it is not necessary that the donee should surrender to the donor his actual possession, in order that the latter may re-deliver the

same to him in execution of the gift; but if the donor relinquishes all dominion over the thing given, and recognizes the possession of the donee as being in his own right, and the latter accepts the gift, and retains possession in virtue thereof, the gift is complete.

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1861.

TENBROOK
v.
BROWN.

There is no presumption of unfair dealing from the fact that the parties occupy to each other the relation of father and son, but the burden of proving fraud, undue influence, or unfair dealing, rests upon him who alleges it.

A party has the right, if properly asserted, of having all modifications and explanations of instructions reduced to writing.

APPEAL from the *Parke* Common Pleas.

Wednesday,
December 11.

WORDEN, J.—Suit by *Tenbrook* against *Brown*. Judgment for the plaintiff, who appeals in consequence of the smallness of the verdict and judgment.

Tenbrook was one of the heirs and distributees, through his mother, of *Samuel Brown*, deceased, and the defendant, *Brown*, was a son of the deceased, and his executor. The complaint sought distribution to the plaintiff of his share of the estate. The controversy in the case grew, mainly, out of the fact that the defendant claimed the most of the personal property, supposed to have been left by the deceased, as having been given to him by the deceased in his lifetime.

We will notice the points relied upon in the brief of counsel for a reversal.

The first is, that the Court erred in overruling a demurrer to a paragraph of the defendant's answer.

The demurrer in question assigned for cause none of the six specified causes of demurrer provided for by statute. It is a common law general demurrer, in the following form:

"Comes now said plaintiff and demurs to the second paragraph of the defendant's answer, and says that the same is not sufficient in law to enable the defendant to sustain his said defense, or to bar the plaintiff's complaint."

In *Lane v. The State*, 7 Ind. 426, the Court held substantially such a demurrer to be bad, and that it should have been overruled, as not in compliance with the statute. Following that decision, we hold that no error was committed in overruling the demurrer, without examining the sufficiency of the pleading to which it was filed.

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1861.

TENBROOK
v.
BROWN.

At the proper time, the plaintiff asked the following instructions to the jury, viz.,

"4. That if the jury believe from the evidence that the property claimed as a gift by the defendant, was in the possession of the defendant as agent or manager for defendant's father, before the time the gift is claimed to have been made, and no apparent change of ownership or control had taken place after that time, there is no valid gift." This charge was refused as asked, but given, striking out the words, "there is no valid gift," and adding, "it is evidence tending to prove that there had been no gift."

"5. That if the jury believe from the evidence that the relation of parent and child existed between the donee and *Samuel Brown, Sr.*, it is the duty of the jury to weigh well, and scrutinize closely, any facts in evidence tending to show any undue influence, or improper exercise of authority, over the donor; and if the defendant has taken a gift under such circumstances from his father, the proof lies upon the defendant to show that he has dealt fairly with his father, as with a stranger, taking no advantage of his influence or knowledge."

This charge was given as asked, with a slight alteration of phraseology, not affecting the substance, in this: instead of saying, "if the defendant has taken a gift under *such circumstances*," it was made to read, "if the defendant has taken a gift under *undue influence*, or *improper exercise of authority*," &c. The Court also added to the charge the following words: "but unfair dealing by the son is not to be presumed because the relation of father and son exists. The burden of proof of undue influence, or unfair dealing, is on the plaintiff."

We are of opinion that the fourth charge, as asked, was properly refused; and that as given, it was as favorable to the plaintiff as he could legally claim.

There can be no doubt that delivery is necessary to pass the title to a chattel by gift. Chancellor *Kent* says on this subject, "Delivery in this, as in every other case, must be according to the nature of the thing. It must be an actual delivery, so far as the subject is capable of delivery. It must

be *secundam subjectum materiam*, and be the true and effectual way of obtaining the command and dominion of the subject. If the thing be not capable of actual delivery, there must be some act equivalent to it. The donor must part, not only with the possession, but with the dominion of the property." 2 Kent's Com., 3d Ed., p. 438.

Nov. Term,
1861.

TENBROOK
V.
BROWN.

Now, it seems clear enough that if the property in question was in the possession of the defendant, as agent or manager for his father, at the time of the gift, still, his father might execute to him a valid gift of the property while thus in his possession. The law clearly would not require, in such case, that the defendant should first surrender his actual possession to his father, in order that his father might redeliver the property to him in execution of the gift. It would seem that in such case the gift would be complete, if the father bestowed the property upon the defendant and relinquished all dominion and control over it, and recognized the defendant's possession thereof as being in his own right; and if the defendant, on his part, accepted the gift, and retained possession of the property in virtue thereof, with his father's consent. Actual delivery could not be made, without first going through the useless formality of surrendering up possession, because possession was already in the defendant. Such acts as above indicated would seem to be equivalent to a delivery, and to be sufficient to vest the property in the donee.

It seems to us that all this might have been done, and yet that there might not have been, in the language of the charge asked, any "*apparent* change of ownership or control," after the gift. The charge implies that there must have been such a change of ownership or control as would be "*apparent*" to the world. The defendant, as is assumed in the charge, having the possession of the property at the time of the gift, we think the gift might be valid, although there was no such apparent change of the ownership or control thereof. There might have been a real change of ownership, and of the capacity in which the defendant controlled the property, which appearances would not necessarily indicate. This is a question between an heir of the donor and the donee. If the rights of creditors of the donor

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1861.

TENNIBROOK
v.
BROWN.

were involved, the question might admit of a different solution.

The fifth charge was given, in substance, as asked. The change of phraseology was well enough, for while it did not alter the meaning, it made that meaning more clear, and more easily understood by the jury. The additional matter appended to the charge may be regarded as an independent charge given by the Court. The matter thus appended we regard as clearly right in point of law. We know of no principle or authority authorizing the presumption of unfair dealing, between father and son, to be drawn simply from the fact of that relationship. On the contrary, it is a general principle, that the burden of proving fraud, undue influence, or unfair dealing, rests upon him who alleges it.

The next point is, that the Court erred in admitting improper evidence to go to the jury. The evidence consisted of the defendant's tax list of property. The evidence was offered, and though objected to by the plaintiff, was admitted.

The appellee makes the point that no exception was taken to the ruling in this respect. We have examined the record carefully, and find no such exception. In a general bill of exceptions filed in the cause we find the following statement: "Defendant then offered in evidence a sworn tax list of the property given in to the assessor of *Reserve* township, in _____ by *Perry Brown*. Plaintiff objects. Objection overruled. (Which tax list was never filed nor placed among the papers of the cause.)" This is all that appears in the bill of exceptions. Appended to the transcript is an agreement of counsel setting out a description of the tax list, and stating that it was offered in evidence for the purpose of showing that all the property on the place belonged to the defendant. That "it was objected to by the plaintiff, for the reason that it was manufacturing evidence for the defendant, and the objection was overruled, and that it is the same list referred to in the exceptions."

This means, we suppose, that the list was the same as that referred to in the bill of exceptions, for it is no where else referred to at all. It will be observed that neither the bill of exceptions nor the agreement states that any

exception was taken to the ruling of the Court in admitting the evidence. No exception having been taken, there is no question properly before us, as to the admissibility of the evidence.

Nov. Term,
1861.

PORTER
v.
THE STATE.

The next point assumes that the Court made verbal modifications and explanations of the charges given. A party has the right, if properly asserted, to have all modifications and explanations of charges reduced to writing, and if this should be refused, an exception might be taken to such refusal. *McClay v. The State*, 1 Ind. 385. In this case, however, it does not appear from the record that any such verbal explanations or modifications were made.

The only remaining point is, that the plaintiff was entitled to interest upon the amount due him, whatever that might be. There is no instruction in the record on the subject of interest, nor do we find that any was asked and refused. If there is any question before us as to interest, it arises on the evidence, upon which we see no good reason for disturbing the verdict and judgment.

Per Curiam.—The judgment is affirmed, with costs.

R. Maxwell, S. C. Wilson, L. Wallace and J. P. Usher, for the appellant.

J. M. Allen, J. G. Crain, J. E. McDonald and A. L. Roache, for the appellee.

PORTER v. THE STATE.

17	415
181	328

In a prosecution for forgery, the indictment alleged that on, &c., at, &c., the defendant did unlawfully, &c., give, barter, sell, utter, publish and put away, to one B., sixteen false, forged and counterfeit bank notes, the genuine of which bank notes were current at the time, in the State of Indiana, and which purported to be genuine, and were for, &c., each, and issued by the *Winstead Bank of Connecticut*, payable to "*E. Seymour*, or bearer." Copies of the notes were set forth in the indictment. On the trial, the defendant offered to prove that at the *October* term, 1860, of said Court,

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1861.

PORTER
v.
THE STATE.

in a case of the State against him, on an indictment for forgery, then on trial, the witnesses gave testimony in reference to the same bank notes, and the same transaction mentioned in the indictment upon which defendant was then being tried. The Court having refused to allow the testimony to be given, the defendant then offered in evidence the record of a conviction, for the purpose of showing that he had been once tried and convicted for the same offense. The record offered, showed that a person of the same name had been tried and convicted on an indictment for a forgery in all respects similar to the one now charged, except that the notes in the former case were charged to have been payable to "*E. Lymour or bearer.*" Held, that the record of the alleged former conviction, viewed as an isolated item of evidence, was properly rejected; as the counterfeit notes described in the former case did not correspond with those described in the pending indictment; but that viewed in connection with the parol evidence offered to show the offenses to have been, in fact, identical, the record was competent, and should have been admitted, even though the two items of evidence were offered separately, and not technically in order.

Held, also, that it was not necessary to the full description of the offense charged, to allege that the genuine notes were current, and that such an averment was mere surplusage.

Held, also, that it is not necessary, where the trial is upon the original indictment, that the record should show that it had been recorded, compared with the original, and certified by the judge.

Held, also, that an order that the defendant should stand committed until the fine and costs were paid or replevied was erroneous so far as the order related to the costs.

Wednesday,
December 11.

APPEAL from the Warren Circuit Court.

HANNA, J.—The appellant was indicted at the *April* term, and tried at the *October* term, 1861, for forgery. The indictment avers that he did on, &c., at, &c., unlawfully, &c., give, barter, sell, utter, publish, and put away, to one *Silas Birch*, sixteen false, forged, and counterfeit bank notes, the genuine of which false, &c., bank notes were current at the time aforesaid in this State; which notes purported to be genuine, &c., and were for, &c., each, and issued by the *Winstead Bank of Connecticut*, payable to "*E. Seymour or bearer,*" at, &c. Copies of the notes are set forth.

Trial on plea of not guilty; verdict of guilty, and judgment on the verdict. It is objected that the Court erred in two rulings, in excluding evidence offered by the appellant.

1. In excluding certain testimony sought to be elicited

from the prosecuting witness. 2. In excluding a record of a former trial and conviction of said defendant. Nov. Term,
1861.

As to the first ruling, the defendant offered to prove by the witness, that at the *October* term, 1860, of said Court, in a case of the State against the same defendant, charged by indictment with forgery, and then on trial, said witness gave testimony in reference to the same bank notes, and the same transaction about which he had just testified; that they were the same bank notes, and it was the same man, and the same transaction. The Court refused to permit the proof, on the ground that it was not the best evidence. As to a part of the proof offered, it is insisted that the ruling was clearly correct; that is, that the record of the former trial was the best evidence as to whether the notes offered in evidence were the same upon which the former prosecution had been founded, and that as the rules of pleading required the notes to be set forth, or an excuse shown for failing to do so, this Court would presume, seeing them so set forth in the present indictment, that they were contained in the former, if that prosecution was for the same act; and that, therefore, no oral evidence should have been received upon that branch of the proposition. PORTER
V.
THE STATE.

It is admitted to be true, that a party can, ordinarily, begin with such part of his evidence as he sees proper; but it is said that here, the offer was made as a whole, and included too much, or not enough. That although the proof of identity of person, and perhaps of the transaction, could be made by the oral testimony of the witness, yet the attempt to do so having been coupled with the offer to prove that which should have been proved by the record of the former trial, that thereby the whole offer was vitiated. That the offer to make the proof should have been made as separate propositions, or coupled with the offer of the record also.

The defendant then offered the record of a conviction, as a separate item of testimony, for the purpose of showing that he had been once placed in jeopardy, and tried and convicted, for the same offense. That record, as offered, showed that a person of the same name had, at the *October* term, 1860, of said Court, been tried and convicted for the same

Nov. Term, 1861. offense here charged, namely, forgery, in uttering and putting away, &c., certain bank notes on the same bank, &c., and corresponding with the charge here made against appellant, except that the said notes were payable to "*E. Lymour* or bearer," and not to *E. Seymour* or bearer." See *Porter v. The State*, 15 Ind. 433.

PORTER
v.
THE STATE.

It is argued, that although the general charge was the same, to wit, forgery, yet if the conviction for passing, &c., notes payable to "*E. Lymour*" would, unsupported by other testimony than that as to identity, be a bar to a prosecution for a like offense in passing notes payable to "*E. Seymour*," then this Court came to a wrong conclusion in the above cited case of *Porter v. The State*. That the theory upon which that decision was based was, that *Lymour* and *Seymour* were distinct names, representing two different persons, and that a note payable to the one should not be received on a charge that it was payable to the other; that is, that distinct notes might be put in circulation payable to each of the said persons. As a consequence of this, a conviction for passing notes payable to one, would not bar a prosecution for passing others payable to the other person. That the ruling in refusing to receive, as an isolated item of evidence, the said record, was therefore correct.

In connection with these points, thus presented, we had as well consider the ruling of the Court in refusing a new trial, because of these several rulings in rejecting evidence. Upon that motion, the Court had before it both these rulings for consideration; that is to say, the offer of the defendant to prove by the record that a *William Porter* had been convicted for passing, &c., to a certain person, certain bank notes payable to one "*E. Lymour*," of certain denominations and numbers, and issued by a certain bank; and also the proposition to prove by a witness, bearing the same name with the person to whom the State charges, in each of the indictments, the notes were passed, that the transaction described in each of the indictments is the same, the person charged the same, and the notes passed the same; and, also, the latter indictment describing like notes, except as to the name of the person to whom payable. The record does not inform us

of any evidence having been produced to the Court, invalidating, or rendering inoperative, that judgment of conviction. Looking to these facts, did the Court err in refusing a new trial, and in the rulings in rejecting evidence?

Nov. Term,
1861.

PORTER
v.
THE STATE.

Now, although the Court would, upon the motion for a new trial, have before it the rulings made during the trial, and which were made the basis of the motion then under consideration, yet, strictly speaking, it is exceedingly doubtful whether there would be any error in overruling such motion, because the rulings might then appear to have worked injustice, when viewed in connection, unless errors of law were committed at the time such rulings were made. But we need not pass upon this point, for we are of opinion that when a conviction has been had, and stands unreversed, &c., upon a valid indictment, the defendant has a right to avail himself of it, when the whole evidence offered shows that he was thus convicted of the same offense for which he is again being prosecuted, although it is apparent that he might have availed himself of objections not affecting the validity of the record, if he had seen proper to do so, during the progress of the former trial, which would have resulted in his acquittal. If he did not seek advantage under those objections, or if, seeking them, they did not benefit him, but the prosecution resulted in a conviction to which he submitted, we can not see but that it would bar another prosecution. This must be so, or else it follows that an erroneous conviction would not, in any case, bar another prosecution. Suppose a man is prosecuted for the killing of *A. B.*, a stranger; is convicted, and sentenced to five years' imprisonment; and afterward it should appear that the stranger's name was *C. D.*, a fact known all the time to the defendant, could he be prosecuted and convicted for killing *C. D.*, by shutting out the record of the former conviction and facts connected with it, and sentenced to a longer imprisonment? We do not think so.

We shall not stop to inquire, minutely, as to whether the rulings of the Court as to each item of evidence, when offered, were correct or not. It is apparent that in the several offers made, the defendant proposed to introduce all the

Nov. Term,
1861.

PORTER

v.

THE STATE.

proof that was necessary to establish the *fact* that he had been prosecuted and convicted for passing the identical bank notes for which he was then being prosecuted; and that it was the same act of passing for which he was thus again placed upon his trial. When that fact was fully developed, as it was here, that is, where the proof offered, if admitted, would have established the fact, it was the duty of the Court to admit the evidence, even if the offers, when separately made, were not strictly and technically in order; a question about which we need give no opinion. But supposing the oral testimony offered had been erroneously admitted, when first offered, still, that error would have been cured upon the admission of the other proof proposed. See *The Toledo, &c. Railroad Co. v. Fisher*, 13 Ind. 258, in which there is an error of the compositor in the following sentence: "And if such declarations are erroneously admitted before proof of the agency, subsequent proof of the agency *were then* error." The words italicised should read, "cures the," as they were written.

The Court instructed the jury that it was not necessary for the State to allege and prove that there were, when, &c., genuine notes of said bank current and in circulation in this State; and refused to instruct that the averment to that effect must be proved. The indictment was founded on the following statute: "Every person who shall give, barter, sell, utter, publish or put away, any forged or counterfeit gold or silver coin, which shall be at the time current or in circulation in this State, or any false, forged or counterfeit bank note, bill or draft, &c., with intent to have the same put in circulation, knowing the same to be forged," &c. 2 R. S., § 33, p. 416.

It is insisted that it was necessary to allege and prove that said bank notes were current, or in circulation, &c.; but if not necessary to allege it, that having done so, the State must support the same by proof.

We are of opinion that it was not necessary, to the full description and charging of the offense, under this statute, to allege that said notes were current; and such an averment being unnecessary to make out the charge of the offense, that if made, it was mere surplusage.

A motion in arrest was overruled. It is insisted that the record is fatally defective, in not showing that the indictment had been recorded, compared with the original, and certified, &c., by the judge.

Nov. Term,
1861.
PORTER
v.
THE STATE.

This was not necessary, where the trial was upon the original indictment. The statute is merely for the purpose of preserving among the records a copy of each indictment, authenticated in a mode pointed out, so as to prevent difficulty consequent upon the loss of the original. The recording, &c., has nothing to do with the validity of the original.

It is urged that the Court erred in pronouncing judgment upon the verdict, in this: the record states that "comes now, &c, and the defendant is commanded to stand up and receive the sentence and judgment of the Court, in pursuance of the verdict. It is therefore," &c.; then follows the judgment on the verdict, and that "the defendant be committed to the county jail, until the fine and costs are paid or replevied."

Two objections are taken to the action: 1. The defendant was not asked if he had any thing to say why judgment should not be pronounced upon the verdict. 2. It was error to order his committal for the costs.

The first objection is based upon § 126, 2 R. S., p. 378. "When the defendant appears for judgment, he must be informed by the Court of the verdict of the jury, and asked whether he have any legal cause to show why judgment should not be pronounced against him."

The first question is settled in the case of *McCorkle v. The State*, 14 Ind. 39, against the appellant; and the other, as to the judgment, &c., relative to costs, in his favor, by the case of *Thompson v. The State*, 16 Ind. 516.

Per Curiam.—The judgment is reversed, with direction to the keeper of the state prison to return the appellant to await further proceedings.

J. H. Brown and *James Park*, for the appellant.

R. W. Harrison, for the State.

Nov. Term,
1861.

HARRISON v. THE STATE.

MURPHY
v.
ROBBINS.

Wednesday,
December 11.

APPEAL from the *Vanderburg* Common Pleas.

Per Curiam.—This was a prosecution for larceny. Trial, and conviction. There was no other basis for the proceeding than the information filed by the district attorney. That does not show the steps by which the Court obtained jurisdiction; whether the defendant was in custody or not. The motion in arrest should have been sustained. *Justice v. The State, ante*, p. 56.

The judgment is reversed, with directions to the clerk to notify the keeper of the state prison thereof.

A. L. Robinson, for the appellant.

James G. Jones, Attorney General, for the State.

MURPHY v. ROBBINS and Others.

An agreement not to sue for a limited time upon a promissory note, is no bar to an action on the note, commenced within the time limited.

Wednesday,
December 11.

APPEAL from the *Putnam* Common Pleas.

DAVISON, J.—The appellees, who were the plaintiffs, sued *Murphy* on two promissory notes, one for the payment of \$150, and the other for \$71. The first note bears date *November 28, 1857*, and is payable at six months; and the second is dated *August 2, 1858*, and payable one day after date.

The defendant answered the complaint by two paragraphs, to each of which the plaintiffs filed a separate demurrer. The demurrers were sustained, and final judgment given for the plaintiffs.

In his brief, the appellant makes no point relative to the action of the Court in sustaining the demurrer to the second paragraph, hence the first, alone, will be noticed.

The first paragraph alleges, "that about *June 10, 1859*, the

plaintiffs, for a good and valuable consideration, agreed with the defendant to, and did, extend the time of payment on said notes, and each of them, for four months from *June 10*; wherefore the said defendant says that the said notes are not due." Nov. Term, 1861.

PHELPS
v.
TILTON.

This answer concedes that the notes, on their face, are due, but alleges, in effect, that because of the agreement "to extend the time of payment," they were really not due at the commencement of the suit. And hence the only question to settle is, can such agreement be set up in defense of the action? *Love v. Blair*, 6 Blackf. 228, decides that "An agreement not to sue for a limited time on a promissory note, is no bar to a suit on the note commenced within that time." See, also, *Clark v. Snelling*, 1 Ind. 382; *Thalman v. Barbour*, 5 *id.* 178; *Smith v. Grabill*, 15 *id.* 267; 2 Am. Law Reg. 389. Upon these authorities, we must hold the demurrer well taken.

Per Curiam.—The judgment is affirmed, with 10 per cent. damages and costs.

Crane, Mason and Hanna, for the appellant.

R. L. Hathaway, for the appellees.

PHELPS v. TILTON.

Motion for a new trial, for the following causes, viz., "1. Irregularity in the proceedings of the Court. 2. Error of law occurring at the trial, and excepted to by the defendant."

Held, that the causes assigned were too general to present any point for the consideration of the Supreme Court.

A transcript of a judgment containing no *placita*, showing the style and term of the Court in which, and the place where, the judgment was rendered, will not support an action.

The certificate of the judge, required by § 286, 2 R. S., p. 93, to be attached to the transcript of a foreign judgment, to authorize the admission of such transcript in evidence, must show that the person so certifying was judge of the Court in which the judgment was rendered.

APPEAL from the *Elkhart* Common Pleas.

DAVISON, J.—*Tilton*, who was the plaintiff, brought an

Wednesday,
December 11

Nov. Term,
1861.
PHELPS
v.
TILTON.

action against *Phelps*, alleging in his complaint that the defendant was indebted to him \$300, in this: that on *August* 30, 1848, the plaintiff, by the determination of the Supreme Court of the State of *New York*, in the county of *Livingston*, recovered a judgment against the defendant for \$174, with costs taxed at \$8, as by the records of said Supreme Court will fully appear; which judgment remains unpaid, and has never been reversed. A transcript of the judgment sued on was filed with the complaint, and is, with its authentication, thus set forth in the record:

"HENRY TILTON }
v. } Supreme Court, *Livingston* county.
LEWIS PHELPS, }

"*Henry Tilton* complains of *Lewis Phelps*, that on *November* 12, 1845, by his promissory note, for value received, he promised to pay the plaintiff \$145, and that he has not paid the same, whereupon the plaintiff demands judgment against the defendant for \$145, with interest, &c.

(Signed) "W. M. ALDER,
Plaintiff's Attorney."

"LIVINGSTON COUNTY, ss.

"*Erastus C. Dewey*, being duly sworn, says that he did, on *August* 7, 1848, serve on the within named defendant the within summons, and a copy of the within named complaint.

(Signed) "E. C. DEWEY."

"Sworn before me, *August* 15, 1848.

"WM. M. ALDER, *Justice.*"

"HENRY TILTON }
v. } Supreme Court, *August* 30, 1848.
LEWIS PHELPS, }

"The summons, with a copy of the complaint, having been served on *Lewis Phelps*, the defendant, on *August* 7, 1848, and no copy of an answer to the complaint having been served on the plaintiff's attorney, as required by the summons, now, on motion of *William M. Alder*, attorney for the plaintiff, it is here adjudged that the plaintiff recover of *Lewis Phelps* \$174, with costs, \$8, making, in the whole, \$182, &c.

"WILLIAM H. WHEATLY,
Clerk of Livingston county."

"STATE OF NEW YORK,

COUNTY OF LIVINGSTON, CLERK'S OFFICE, ss.

Nov. Term,
1861.

"I hereby certify that I have compared the foregoing with the original judgment roll on file in this office, and that the same is a true copy thereof, and of the whole of said original.

PHILIPS
v.
TILTON.

"In testimony whereof, I have hereunto set my hand and the seal of said county, this 10th day of *August*, 1857.

(Signed) "CHARLES ROOT, *Clerk*."

"I, *Thomas A. Johnson*, presiding judge of the Supreme Court of the State of *New York*, in the seventh judicial district, do certify that the foregoing attestation and certificate of *Charles Root* is in due form of law, and that the said *Charles Root* is the clerk of said court, and is the proper person to make such attestation and certificate.

(Signed) "THOMAS A. JOHNSON."

The defendant demurred to the complaint; but the demurrer was overruled, and he excepted. And thereupon he answered: 1. By a general traverse. 2. Payment. Reply in denial of the second paragraph. The issues were submitted to the Court, who found for the plaintiff, and, having refused a new trial, rendered judgment, &c. The causes for a new trial are thus assigned: 1. Irregularity in the proceedings of the Court. 2. The finding of the Court is unsustained by the evidence and is contrary to law. 3. Errors of law occurring at the trial, and excepted to by the defendant.

It may be noted that the first and third assignments are too general, and for that reason present no point for consideration. *Snodgrass et al. v. Hunt*, 15 Ind. 274. And this being the case, the ruling upon the demurrer, and the refusal to grant a new trial on the ground that the evidence was insufficient, present the only questions arising in the record. The complaint is alleged to be defective on two grounds: 1. Because the transcript upon which it is founded has no *placita*. 2. The transcript itself is not properly authenticated. The office of the *placita* is to indicate the style and term of the court in which, and the place where, the judgment was rendered. Burrell's Law Dic. 800. This exposition being correct, the transcript evidently contains no regular *placita*, and the result is, it contains no sufficient basis

Nov. Term, on which to found an action. *Doe v. Smith*, 4 Blackf. 228.
 1861. True, its language may allow the inference that the judgment

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v.

TILTON.

was rendered in a "Supreme Court held in *Livingston* county, on *August* 30, 1858;" but that is insufficient, because it fails to name the State or territory in which the county of *Livingston* is situated. It follows, that "the place where" the recovery was had is not sufficiently shown by the transcript.

The defect said to be in the authentication is, that *Thomas A. Johnson*, who, in his certificate, alleges that he is the "presiding judge of the Supreme Court of the State of *New York*, in the seventh judicial district," fails to certify that *Livingston* county, the place where the judgment was rendered, was within that "judicial district." We have a statute which says: "The records and judicial proceedings of the several courts of record of or within the *United States*, or the territories thereof, shall be admitted in the courts within this State, as evidence, by attestation or certificate of the clerk, and seal of the court annexed, together with the certificate of the chief justice, or one or more of the judges, or presiding magistrate, of *such court*, that the person who signed the attestation or certificate was, at the time of subscribing it, the clerk of the court, and that the attestation is in due form, &c." 2 R. S., § 286, p. 93. Thus it will be seen, that the chief justice, judge or presiding magistrate who certifies to the attestation of the clerk, must be of the same court in which the judicial proceeding to be admitted as evidence is of record. But for aught that appears in the certificate before us, the judge who makes it may not be chief justice of the court from which the transcript in this instance was issued. The demurrer, it seems to us, was well taken. And as the transcript, so authenticated, was the only evidence given in the cause, the judgment of the Common Pleas Court must be reversed.

Per Curiam.—The judgment is reversed, with costs. Cause remanded, &c.

Harris and Baker, for the appellant.

DRAGOO v. GRAHAM.

Nov. Term,
1861.DRAGOO
v.
GRAHAM.

Suit upon the transcript of a judgment rendered by a justice of the peace in the State of *Ohio*. The judgment appeared to have been rendered by confession, the transcript reciting: "Now comes *A.*, with a power of attorney to confess judgment; whereupon the defendant, by his attorney, waived the issuing and service of process, and confessed judgment," &c. The transcript was certified to be a full, true and complete copy, &c., by a justice of the peace of "*Ashland*, formerly *Richland*, county, *Ohio*;" who further certified that he had the legal custody of the docket in which said judgment was recorded. A certificate was appended by the clerk of *Ashland* county, stating that the justice whose certificate was attached to the transcript was an acting justice of said county, duly commissioned, &c., and that his signature was genuine, and his certificate in due form of law, &c. A certificate was also attached by the clerk of *Richland* county, stating that the justice before whom said judgment was rendered, was, at the time, an acting justice of the peace of *Richland*, now *Ashland*, county, duly qualified, &c.

Held, that though the record of the justice was informal, and perhaps irregular, it was sufficient as the basis of an action, and sufficiently showed that the justice had acquired jurisdiction of the person of the defendant.

Held, that the certificates to the transcript were in due form of law, and the transcript was, under 2 R. S. 1852, § 279, pp. 90, 91, admissible in evidence, without the authentication of a judge.

APPEAL from the *Lagrange* Common Pleas.

Wednesday,
December 11.

DAVISON, J.—*Graham* brought an action against *Dragoo*, alleging in his complaint that on *April* 16, 1840, before *William Devine*, a justice of the peace of *Richland* county, and State of *Ohio*, he recovered a judgment against *Dragoo*, for \$33.65; a copy of which is filed, &c. Proper issues having been made, the cause was submitted for trial to the court. Finding for the plaintiff. New trial refused; and judgment, &c.

During the trial, the plaintiff offered in evidence the following transcript, with its authentications:

"FRANCIS GRAHAM	}	Action of debt; cognovit, dated <i>Dec.</i>
"		17, 1839, given for \$33.05; interest,
FREDERICK DRAGOO.		\$0.60; demand, \$33.65.

"*April* 10, 1840. Comes *S. Robins*, with a power of

Nov. Term, attorney to confess judgment. Whereupon the defendant, by
 1861. his attorney, waived the issuing and service of process, and
 DRASCO confessed judgment for the above demand. And it is there-
 V. fore considered by me, that the plaintiff recover of the de-
 GRAHAM. fendant, \$33.65, debt, and costs of suit," &c.

"STATE OF OHIO, ASHLAND,
 formerly RICHLAND, COUNTY:

"I, *William Millingham*, a justice of the peace, within and for the township of *Montgomery*, in said *Ashland*, formerly *Richland*, county, *Ohio*, do hereby certify that the foregoing is a full, true and complete copy of the proceedings and judgment in the above entitled cause, from the docket of *William Devine*, late justice of the peace in the township and county aforesaid, of which docket I have the legal custody.

"Witness my hand and seal, this *February 4*, 1854.

"WILLIAM MILLINGHAM, [SEAL.]
Justice of the Peace."

"STATE OF OHIO, ASHLAND COUNTY:

"I, *John Sheriden*, clerk of the Court of Common Pleas, within and for the county aforesaid, certify that at the date of the certificate and copy of the annexed judgment, the said *William Millingham* was an acting justice of the peace in and for said county; and, as such, duly commissioned and qualified, and authorized by the laws of this State to make the same; and that I am acquainted with his handwriting, and verily believe that the signature is genuine. And I further certify that the said instrument and certificate are executed according to the existing laws of this State.

"In testimony whereof, I have hereunto set my hand and the seal of our Court, at *Ashland*, this *February 18*, 1854.

"J. SHERIDEN, Clerk." [SEAL]

"STATE OF OHIO, RICHLAND COUNTY, SCT:

"I, *C. A. Croninger*, clerk of the Court of Common Pleas, within and for the county of *Richland*, and State of *Ohio*, certify that *William Devine* was, on the 10th of *April*, 1860, at the time the proceedings were had, and judgment

rendered in the within entitled cause, a justice of the peace of said *Richland* county, (now *Ashland* county,) duly commissioned and qualified to act as such; and to all whose official acts, as such, full faith and credit are due; and that said proceedings were had in conformity to the laws of the State of *Ohio*.

Nov. Term,
1861.

DRAGOO
v.
GRAMAN.

"In witness whereof, I have hereunto subscribed my name, and affixed the seal of said Court, at *Mansfield*, this 20th of *February*, 1854.

"C. A. CRONINGER, *Clerk*." [SEAL.]

The introduction of this transcript was resisted, on five grounds: 1. It contains no reference to State or county. 2. It was not authenticated by a presiding judge. 3. The record ought to show that there had been notice to the defendant of the pendency of the action, or it should contain enough of the power of attorney to show that it authorized the judgment to be confessed. 4. There is no certificate of the clerk of *Ashland* county to show that the person who rendered the judgment was a justice of the peace. 5. The justice of *Ashland* could not have the legal custody of the docket of a justice of *Richland* county; and the certificate of the clerk of *Richland* county is a nullity. The Court admitted the evidence, and the defendant excepted. And thereupon the plaintiff gave in evidence a statute of *Ohio*, conferring jurisdiction upon a justice in cases such as that set forth in the transcript.

The objections to the admission of the transcript as evidence in the case, are, it seems to us, not well taken. The judgment rendered by the justice is, it is true, informal, and may be irregular; still, we deem it a proper basis on which to found an action. The township, county, and State in which the judgment was rendered, sufficiently appear in the certificate of the justice; and it is enough that the transcript, on its face, shows that the defendant, by his attorney, "waived the issuing and service of process." This is considered a sufficient answer to the first and third objections. The second, fourth and fifth grounds of objection relate to the certificates of the clerks, and to the authentication of the transcript.

Nov. Term, 1861. We have a statute which says: "Copies of the proceedings and judgments of any justice of the peace of any State or territory of the *United States*, certified by the justice, under his hand and seal, before whom the proceedings were had, or judgments rendered, or his successor in office, or other justice having the legal custody thereof, that the same are true and complete copies of the proceedings or judgments, with the certificate of the clerk, &c., of any court of record of the county, &c., where such justice shall hold his office, certifying, under the seal of said court, that the justice was, at the time when the proceedings were had, or judgment rendered, and when the copy was taken, duly commissioned and qualified to act as such, shall be admissible as evidence in any of the courts of this State." 2 R. S., § 279, pp. 90, 91.

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v.
CAMPBELL.

This statutory rule evidently applies to the case at bar. The certificate of the clerk is in due form, and, without the authentication of a judge, was sufficient to authorize the admission of the transcript as evidence. And the justice who makes the transcript certifies it to be a full and complete copy, &c., and that the docket from which it was taken is legally in his custody. This seems to be a full compliance with the statute. And further, in the absence of contrary proof, we must intend that *Montgomery* township, though in *Richland* county when the judgment was rendered, was legally within *Ashland* county when the transcript was issued.

Per Curiam.—The judgment is affirmed, with 5 per cent. damages and costs.

A. Ellison, for the appellant.



at sections sixteen and seventeen, and running on the line between *Barr* and *Washington* townships, due south, or as nearly so as it can run to get a good road, to intersect the *Alfordsville* road." After viewers had been appointed, and had reported in favor of the road, a remonstrance was filed, claiming damages. Viewers having reported against the claim for damages, the remonstrants appealed to the Circuit Court, and there moved to dismiss the proceedings for want of a sufficient petition.

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v.
CAMPBELL.

Held, that if the petition was so insufficient as to form no basis for the action of the board, an objection thereto would be fatal at any stage of the proceedings.

Held, also, that a petition for the location of a highway passing through but one county must, under our statute, set out the names of the owners, or occupants, or agents, of the lands through which the proposed highway would pass; and in the absence of such requisite in the petition, the board is not authorized to act upon the same.

APPEAL from the *Daviess* Circuit Court.

Wednesday,
December 11.

HANNA, J.—The appellants filed a petition before the Board of County Commissioners, asking that a county road be laid out and opened, "commencing at the State road leading from *Washington*, *Daviess* county, *Indiana*, to *Bedford*, *Lawrence* county, *Indiana*, at sections sixteen and seventeen, and running on the line between *Barr* and *Washington* townships, due south, or as nearly so as it can run to get a good road, to intersect the *Alfordsville* road." No remonstrance being filed, viewers were appointed, who reported that they had viewed the road, "commencing at sections sixteen and seventeen, on, &c., and running on the line between *Barr* and *Washington* townships, due south, to the line of the *Cincinnati & St. Louis Railroad*, thence west thirteen rods, thence south eighty rods, thence east thirteen rods, thence south to the south side of *Aikman's* creek, thence south-west thirty rods to the *Alfordsville* road; and that the same would be of public utility. A remonstrance was then filed by the appellees, as the record states, demanding their damages occasioned by the location, &c., of said road. Viewers were appointed, who reported that said remonstrants would sustain no damages. The road was ordered to be opened. Appellees appealed to the Circuit Court, upon a bond signed by the surety only, and there moved to dismiss the proceedings for the want of a sufficient petition and report of

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V.
CAMPBELL.

viewers. Appellants in this Court moved there to dismiss the appeal for want of a sufficient bond, and for want of an affidavit of interest in appellants; and also moved to strike out the names of the signers of the original petition as parties, they and the Board of County Commissioners being named as defendants in the appeal.

The Court overruled all the motions of the present appellants, directed the appellants in that Court to file a new bond, and then dismissed the whole proceedings at the costs of the petitioners; and refused judgment for said costs against the county board.

It is insisted that where there is no remonstrance filed to the original application for the appointment of viewers, &c., those persons who may come in and merely object to an order authorizing the opening of said road until their claim for damages is settled, can not, on appeal, object to, or raise the question as to, the sufficiency of the original petition. That all they can do is to ask the Court to determine, in a proper manner, the amount of damages to which they are entitled.

To this it is answered, that even if this position is true as to proceedings legally conducted, it can not apply to those where the petition, &c., is so vague as to give the Board of Commissioners no jurisdiction; and that such is the character of this petition; that it does not, conformably to the statutory requirement, name the beginning, route, and terminus of the intended road, nor the persons through whose lands it will pass.

First, could the Court, under the circumstances, examine the sufficiency of the petition? We are of opinion that if the petition was so insufficient as to form no basis for the action of the board, that an objection thereto would be fatal at any stage of the proceedings. Whether it was thus invalid, depends upon the construction to be given to our statutes upon the subject of highways. 1 R. S., pp. 307-316. The first fourteen sections of said act are devoted to the mode of establishing, &c., highways that run through more than one county, and require that a petition for such road shall contain a description of the "beginning, course, and termination of the same, together with the names of the owners,

or occupants, or agents, of the lands through which the same may pass." The next twelve sections point out the mode of establishing, &c., roads running through but one county, but through more than one township. These sections merely provide that a petition shall be presented to the Board of Commissioners of the county, &c., but do not specify what such petition shall contain. It is provided, though, that the report of the viewers shall contain a full description, &c., of the road, by "routes and bounds, courses, and distances;" but even that report is not required to name the proprietors, &c., of lands through which such road is located.

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1861.

HAYS
V.
CAMPBELL.

Should these statutes be so construed as to require the petition, in the one case, to contain all that is required in the other? The reason, it appears to us, is as strong for requiring the petition to name the persons to be affected by such highway, where it passes through but one county, as where it passes through more. We are, therefore, of the opinion that such should be the character of the petition. In the absence of this essential requisite of the petition, in the case at bar, we are of opinion that the county board were not authorized to act upon the same. One of the very objects to be accomplished by naming the proprietors of the lands, was defeated, namely, that they should, by the notice to be given, based upon such petition, be prepared to remonstrate, if deemed by them expedient. It is now urged that because such remonstrance was not filed in the first instance, that the parties are precluded from taking advantage of defects in such original application.

As the whole proceeding had been thus built up on an insufficient and invalid foundation, the Court did right to dismiss it, because at some future stage of its progress it might, perhaps, have involved persons in serious litigation, in attempting to open and establish said road.

Per Curiam.—The judgment is affirmed, with costs.

J. W. Burton, for the appellants.

John Baker, for the appellee.

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1861.

THORNBURG
v.
ALLEMAN.

Thursday,
December 12.

THORNBURG, Administrator of REAGAN v. ALLEMAN.

APPEAL from the *Morgan* Common Pleas.

PERKINS, J.—*Alleman*, as surviving partner, sued *Thornburg*, administrator of the estate of *Reagan*; deceased, (said *Reagan*, while living, having been *Alleman's* partner,) on an account claimed to be due from *Reagan's* estate to *Alleman*, as surviving partner.

Subsequently, by agreement, the cause of action was enlarged so as to embrace an investigation and settlement of the entire partnership accounts. After this, the cause was referred to a commissioner to take the account.

Subsequently, the commissioner reported; and, on motion, the Court struck out one item in his report, and referred the cause back again to the commissioner for re-investigation, and a second report.

At another term of the Court, a second report was made; the defendant excepted to the report, the exception was overruled, and the cause continued, no bill of exceptions being filed, and no judgment rendered. The future action in the cause showed a waiver of all action by the commissioner. At the term to which the case was continued, the parties appeared; no reference was made by any one to the report of the commissioner, but, says the record, the cause is now, by consent of the parties, submitted to the Court for trial, a jury being waived, and the Court having heard the evidence, and duly deliberated thereon, find for the plaintiff, &c. Thereupon the defendant moved for a new trial, for the single reason, as far as applicable to the state of the case, that "the finding and judgment of the Court were contrary to law and the evidence in the cause;" which motion was overruled, to which ruling the defendant excepted, and filed his bill of exceptions, which contains a volume of evidence, just as detailed by the witnesses, but containing no statement of the accounts between the parties, and no particulars from which a statement could be drawn. The accounts, in fact, between the parties, if they can be ascertained at all from the evidence, can only be so by making them up out

of isolated statements, and conjectures of the witnesses, as taken down; and the bill of exceptions contains the statement, "that this was all the evidence given in the cause."

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1861.

SAWYER
v.
THE STATE

This Court will not consent to assume the duties of clerks and accountants, to the extent required for a decision of this cause upon the evidence. *Nave v. Nave*, 12 Ind. 1; and *Scott v. Miller*, ante, p. 261.

As to the mode of trial, where a cause is referred to a commissioner or referee, see *Royal v. Baer*, ante, p. 332, and cases cited.

Per Curiam.—The judgment below is affirmed, with 1 per cent. damages and costs.

W. R. Harrison and *J. A. Beal*, for the appellant.

L. Barbour and *J. D. Howland*, for the appellee.

SAWYER v. THE STATE.

17 435
187 587

The record of the trial of a criminal charge upon indictment must show, on appeal, by a caption to the indictment, or other proper entry, that a grand jury was impaneled at the term at which the indictment was found, and that the grand jury returned the indictment into Court.

APPEAL from the *Hendricks* Circuit Court.

Thursday,
December 12.

PERKINS, J.—Indictment in the *Hendricks* Circuit Court, charging *Iredell Sawyer* with the murder of *James H. Cooper*, and *Thornton Sawyer* as an aider and abettor of the murder.

The case now before us is the record of the trial of *Thornton Sawyer*, for aiding, &c. The indictment in the case is good enough, in itself considered. It first accurately charges the murder by *Iredell*; and, in a second paragraph, the aiding and abetting of that murder by *Thornton*.

The trial in the Court below, in its actual proceedings, was regular and formal, but, on appeal to this Court, the record does not show who the grand jury were that found the

Nov. Term, indictment, nor that any grand jury had been impaneled for
1861. the term of the Court at which the verdict was found.

HAYWORTH

V.

HAWKINS

A *certiorari* has been issued for the omitted parts of the record, but the clerk returns that no entries appear of record below on these points; so that the defects can not be thus supplied. The counsel for the State has asked a suspension of the decision of the cause for a few months, to enable him to see if at the next term of the Court below the record can not be perfected by *nunc pro tunc* entries; but we think it would be abusing discretion to hold the convict in the penitentiary for such a purpose, supposing his conviction to appear illegal upon the face of the record. The question, then, now presented for our decision is, must the record of the cause, on appeal, show, by a caption to the indictment, or other proper entry, that a grand jury was impaneled at the term at which the indictment was found, and that the grand jury returned the indictment. In this case, the record states that the indictment was returned by the grand jury; but it does not show that any grand jury had been impaneled, and, of course does not show their names, character, or numbers. We think the record should show the impanneling of the grand jury, in a case upon appeal. Otherwise, a charge by authority does not appear against the accused.

Per Curiam.—The judgment is reversed. Cause remanded; and the clerk is directed to notify the keeper of the State prison to return the prisoner to the jail of the proper county.

C. C. Nave and *John Witherow*, for the appellant.

John P. Usher, Attorney General, for the State.

HAYWORTH v. HAWKINS and Another.

Thursday,
December 12.

APPEAL from the *Tipppecanoe* Circuit Court.

Per Curiam.—*Hayworth* purchased of *William* and *James Hawkins*, land that had been devised to *William*,

James, and *Eli Hawkins*, giving his notes for the purchase money, and receiving a bond for a deed at a future day. Suit on the first note.

Nov Term,
1861.

THE BOARD
OF COMMISSIONERS, &c.
v.
SAUNDERS.

The contract of sale was legal, and might be fulfilled; because *William* and *James* might procure from *Eli*, or his heirs, the interest of *Eli*, or cause him or them to unite in the deed of conveyance, when the time should arrive for it to be made.

As to the construction of the will in the case, we refer to, and approve of, the decisions in the cases of *Jones v. Miller*, 13 Ind. 337; *Miller v. Keegan*, 14 *id.* 502; and *Griffin et al. v. Lynch et al.*, 16 *id.* 396. See, also, on this point, *Hall v. Priest*, 6 Gray's (Mass.) Rep. 18.

The judgment is affirmed, with 1 per cent. damages and costs.

G. S. Orth and *J. A. Stein*, for the appellant.

H. W. Chase and *J. A. Wilstach*, for the appellees.

| 17 437
| 131 372

THE BOARD OF COMMISSIONERS OF POSEY COUNTY v. SAUNDERS.

Suit by the *Board of County Commissioners* against *A.*, the former treasurer of the county, alleging that while he was such treasurer he collected, between the third *Monday* of *March* and the first *Monday* of *August*, of a certain year, taxes due said county to the amount of, &c., upon which there was chargeable by law ten per cent, as damages, which he was bound as such treasurer to collect and account for to the auditor, and pay into the treasury; that he failed to receipt to said auditor for the same, or to pay the same into the treasury, or otherwise legally to account therefor. Answer: 1. That at the *June* term of the board, held on, &c., the defendant settled in full with said board, and accounted for all taxes and penalties due and owing to said county. 2. That the cause of action did not accrue within three years next before the bringing of the suit.

Held, that the treasurer was required by § 13 of the act relative to county treasurers, (1 R. S. 1852, p. 501,) to make an annual settlement with the board at their *June* term; and the board, having by law a supervisory control over the finances of the county, had power to settle with the treasurer, and to bind the corporation by such settlement.

Nov. Term, *Held*, also, that the complaint can not be understood to charge the treasurer
1861. with having collected the ten per cent. damages; and hence the case

THE BOARD
OF COMMISSIONERS, &c.

v.

SAUNDERS.

APPEAL from the *Posey* Circuit Court.

Thursday,
December 12.

HANNA, J.—This was a suit by the appellant against the appellee, who was formerly treasurer of said county. The complaint has five paragraphs, similar in every respect, except that each is for a failure to discharge his duty for a year therein named, in this, that it is averred he collected between the third *Monday of March* and the first *Monday of August*, of the named year, from persons and property charged with taxes, and unpaid on the said first named day, taxes due to said county to the amount of, &c.; upon which there was chargeable by law ten per cent., as damages, and which he as treasurer was bound by law to collect and account for to the auditor, and pay into the treasury; which ten per cent. amounts to the sum of, &c. (here a sum is stated, just ten per cent. on the sum named as having been so collected); yet the defendant has failed, &c., and still fails, &c., to receipt to said auditor for the ten per cent., or to pay the same into the treasury, or in any way legally to account for the same.

Answer, in seven paragraphs. Demurrers were filed to all but the first paragraph, which is the general denial, and were sustained as to all but the fourth and sixth. The plaintiff refusing to reply to said fourth and sixth paragraphs, there was judgment for the defendant. The ruling on the demurrer to said two paragraphs is now assigned as error. The appellee, also, assigns cross-errors on the ruling in sustaining the demurrer to the second, third, fifth and seventh paragraphs of his answer; but as he has filed no brief, we will regard said cross-errors as waived.

The fourth paragraph stated, that in pursuance of the statute, the defendant, at the respective *June* terms of said board, held at, &c., on, &c., setting forth the particular days, settled in full at each of said dates, with said plaintiff, and accounted for, and of and concerning, all taxes and penalties,

and sums due or owing, or which by law he as treasurer of, &c., was compelled by law to account for to said plaintiff. Nov. Term, 1861.

Third. Statute of limitations, namely, three years.

The fourth paragraph is objected to on the ground that it is evasive, in not directly admitting or denying the charge of the failure to pay the ten per cent.; and in this, that the Board of Commissioners could not settle with defendant for the same; but that by the law he was required to receipt to the auditor for the same.

THE BOARD
OF COMMISSIONERS, &C
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It is true, that by § 103 of the act in reference to the assessment, &c. of property, it is made the duty of the treasurer to file with the auditor, on the first *Monday* of *August*, a verified schedule of all delinquent taxes collected, and receipt to the auditor for the amount collected for county purposes. This is for the purpose of maintaining the system of checks and balances; by which the amount for which the treasurer should be at any time accountable might be ascertained, without having to resort to his office. But it is also true that by § 13 of the act relative to county treasurers, it was made the duty of the treasurer, annually, to make complete settlement with the board, &c., at the regular *June* term thereof. 1 R. S., p. 501.

The Board of Commissioners have very full powers in reference to the affairs of their respective counties. 1 R. S., pp. 225-230. They control the county property, allow accounts, direct the raising of sums, &c., and audit the accounts of all officers having the care, management, collection or disbursement of any money belonging to the county, or appropriated for its benefit." § 13.

We are of opinion that under these and various other statutes that might be referred to, the Board of County Commissioners have a supervisory control over the finances of the county, and consequently have the power to settle in reference to the same, and to bind the corporation by such settlement. And further, that the general allegations of this fourth paragraph, in regard to the payment of taxes, penalties, &c., is broad enough to include, and does include, the ten per cent. in controversy, which, in fact, is a penalty, in each instance where it properly attaches.

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Although the fourth paragraph was a full answer to the complaint, and disposes of the case, yet we will for a moment notice the sixth paragraph of the answer. It is based upon the following statute: "All actions against a sheriff or other public officer, or against such officer and his sureties, on a public bond, growing out of a liability incurred by doing an act in an official capacity, or by the omission of an official duty, shall be commenced within three years after the cause of action has accrued; but an action may be brought against the officer, or his legal representatives, for money collected in an official capacity, and not paid over, at any time within six years." 2 R. S., § 211, p. 75.

It is argued that the complaint charges the defendant with collecting the money, and failing to pay, &c., and therefore the answer that the cause of action did not accrue within three years is bad.

We do not so understand the complaint. It is true, it is somewhat obscurely worded in that respect; for it has to be closely examined to see whether it charges the omission of duty, upon the treasurer's part, to have occurred in the failure to collect the ten per cent., or in the failure to pay it over after it was collected. But it must be recollected that taxes not paid by the third *Monday of March* become delinquent, and that it is charged that, of those taxes, there was collected, between that day, in each year, and the first *Monday of August*, when they were reported, a certain sum, and that upon that sum ten per cent. was chargeable by law, which he was bound to collect, &c., which ten per cent. amounted to the sum of, &c., stating ten per cent. upon the amount before averred to have been collected. It appears to us, that if the pleader had intended to be understood as charging the defendant with having collected said ten per cent., it would have been included in the sum alleged to have been collected. It can not be said that it is included in said sum, because the amount of said penalty is given at just ten per cent. upon the sum averred to have been collected.

Per Curiam.—The judgment is affirmed, with costs.

John Pitcher and *Conrad Baker*, for the appellant.

Alvin P. Hovey, for the appellee.

CROSS v. BURNS.

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1861.MILLER
v.
HIBBEN.APPEAL from the *Wabash* Common Pleas.

HANNA, J.—This was a suit on notes signed by *Meyer, Chapler* and *Cross*; and to foreclose a mortgage executed by *Meyer, Chapler* and their wives, to secure the payment of said notes. *Thursday, December 12.*

Cross demurred to the complaint, but the demurrer was overruled. This ruling presents the only question for our consideration.

It is insisted that § 636, 2 R. S., p. 176, expressly forbids the prosecution of a proceeding to foreclose, and any other action for the collection of the debt at the same time. That this is a proceeding, at the same time, on the note executed by certain parties, and a mortgage executed by certain other parties; that either the proceedings on the note, or those on the mortgage, must cease; that to attempt to proceed on both is error.

We do not think this statute was intended to meet such a case as this, but to prevent suits in the nature of actions at law, and in chancery, from being prosecuted at the same time, and as distinct proceedings.

Per Curiam.—The judgment is affirmed, with 5 per cent. damages and costs.

Orris Blake, L. H. Goodwin and *T. C. Whiteside*, for the appellant.

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APPEAL from the *Lagrange* Common Pleas.*Thursday,*
December 12.

Per Curiam.—After the issues in this cause had been made up, and the evidence all heard by the jury, the Court permitted amendments to the complaint to be filed, adding to the causes of action, and leading to a reformation of the issues. To the making of these amendments the defendant objected and excepted. See 10 Ind. 199, and 227.

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The Court caused the jury to be re-sworn to try the new issues, and then refused to hear any evidence upon them, but directed the jury to consider the evidence given on the former, as applicable to the new issues. Hearing the evidence is a very important part of the trial of an issue. See Ind. Dig., p. 656. The Court refused, when properly requested by the defendant, to direct the jury to find specially, according to the statute. See Perk. Prac. 295.

The judgment below is reversed, with costs. Cause remanded for further proceedings.

A. Ellison, for the appellant.

HAM and Others v. CARROLL.

In a motion for a new trial, for errors of law occurring at the trial, each error relied upon must be specifically presented to the Court.

Where the defendant amends his answer, after a demurrer has been sustained to it, he waives all right to complain of the ruling on the demurrer.

Thursday,
December 12.

APPEAL from the *Wayne* Circuit Court.

DAVISON, J.—This was an action by the appellee, who was the plaintiff, against *Reuben Thurston*, *Mary Thurston*, *Jason Ham*, *Joel Railsback* and *William De Graff*, to foreclose a mortgage on real estate. The mortgage was executed by *Reuben* and *Mary Thurston*, to *De Graff*, to secure the payment of three promissory notes, each for \$833. The first of these notes has been paid. The second and third, were, together with the mortgage, assigned by *De Graff* to the plaintiff. It is averred in the complaint, that *Reuben* and *Mary Thurston*, after the execution of the notes and mortgage, conveyed the mortgaged premises, by deed in fee simple, to *Jason Ham*, who, afterward, by deed of assignment for the benefit of his creditors, conveyed the same premises to *Joel Railsback*; in whom the legal title now is. Wherefore, &c. *Reuben* and *Mary Thurston* were defaulted.

Ham and *Railsback* answered the complaint. In their answer they allege, that on *April* 19, 1858, and prior to the assignment of the notes and mortgage to the plaintiff, one *Isaac Bates* commenced a suit of attachment against *De Graff*, the payee of the notes, and such proceedings were had in the premises, that afterward, on *April* 24, 1858, a writ of garnishment was sued out and served on one *Lewis Burk*, with whom the notes and mortgage had been placed for collection; and, afterward, on *May* 5, then next following, a similar writ was served on the defendants, to stay in their hands the moneys thereon due; and the defendants aver that the plaintiff did not, at the time the writs of attachment and garnishment were issued, own and possess said notes and mortgage.

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Railsback also filed a separate answer, setting up the commencement of the attachment suit against *De Graff*, the summons against him as garnishee, and alleging that upon the service of the writ of garnishment, he became liable to pay the amount due on the notes to *Bates*, the attachment plaintiff, &c. To these answers demurrers were sustained, and the defendants, by leave, &c., amended. The answer, as amended, states all the facts alleged in the former answers, and, in addition, sets up that at the time *Ham* purchased the mortgaged premises from *Thurston*, it was expressly agreed between *De Graff*, *Thurston* and *Ham*, that *De Graff* should take *Ham* for the amount due on the notes and mortgage, and look to him and said mortgaged premises, exclusively, for the money. There was a reply in denial of the amended answer. The issues were submitted to the Court, who found for the plaintiff, and, having refused a new trial, rendered a judgment against *Thurston* for the amount of the notes and interest, and ordered the premises to be sold, &c.

The causes for a new trial are thus assigned: 1. Excessive damages awarded against defendant. 2. The finding is unsustained by the evidence. 3. Error of law occurring at the trial, and excepted to at the time. It may be noted that the third cause is not well assigned. Each error of law should have been pointed out and presented to the Court. *Snodgrass et al. v. Hunt*, 15 Ind. 274; *Kent v. Larson*, 12 id. 675.

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THE STATE.

The record shows that during the trial, the defendant *Railsback* offered his co-defendant, *Ham*, as a witness, and proposed to prove by him the agreement set up in the amended answer; but the offer was refused, and the defendant excepted. As this ruling does not appear to have been assigned as a cause for a new trial, the question whether the exception to it was or not well taken, is not properly before us. *Snodgrass et al. v. Hunt*, and *Kent v. Lawson*, *supra*.

Again, it is said that the Court erred in sustaining the demurrers to the answer. In this instance, the amended answer embraced all the matter contained in the original answer, and the result is, the answer first filed is no part of the record. 2 R. S., § 559, pp. 159, 160. And, moreover, the defendants having amended their answer, after demurrer sustained to it, waived their right to complain of the sustaining of the demurrers. *Polleys v. Swope*, 4 Ind. 217; *Jay et al. v. Indianapolis, &c. Railroad Co.*, *ante*, p. 262.

Per Curiam.—The judgment is affirmed, with 5 per cent. damages and costs.

William H. Bickle, *C. H. Burchenal* and *J. Railsback*, for the appellants.

Oliver P. Morton, for the appellee.

SIMPSON v. THE STATE.

An indictment or information, under § 11 of the act of March 5, 1859, (Acts 1859, p. 202,) for selling or giving away liquor to a minor, need not state the kind of liquor sold or given away, but must aver it to have been an "intoxicating liquor;" and on the trial it must appear that the liquor was within the definition of the terms, "intoxicating liquor," given in § 2 of the act.

Thursday,
December 12.

APPEAL from the *Gibson* Circuit Court.

WORDEN, J.—Indictment for selling intoxicating liquor to a minor.

The indictment charges that the defendant sold to one *Thomas Harrington*, whom the defendant well knew to be a minor, under the age of twenty-one years, a certain quantity of beer, for a sum named, "the said beer, so sold as aforesaid, being then and there intoxicating liquor.

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SIMPSON
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THE STATE.

Motion to quash overruled, and conviction.

The objection made to the indictment is, that it does not allege the "beer" to have been either "spirituous, vinous, or malt liquor, or any intoxicating liquor whatever, which is used or may be used as a beverage."

The first section of the act of *March 5, 1859*, (Acts 1859, p. 202,) fixes a penalty for selling any intoxicating liquor by a less quantity than a quart at a time, or to be drunk on the premises of the vendor, without first having procured a license. The eleventh section prohibits, absolutely, the selling, bartering, or giving away of *any intoxicating liquors* to persons under twenty-one years of age.

The second section of the act provides that the words "intoxicating liquors," as used in the act, shall apply to any spirituous, vinous, or malt liquor, or to any intoxicating liquor whatever, which is, or may be, used as a beverage.

An indictment need not state the kind of liquor sold, as rum, gin, brandy, beer, ale, &c. It is sufficient if it allege the liquor to have been intoxicating. *The State v. Graeter*, 6 Blackf. 105; *The State v. Mullinix*, *id.* 554.

In both sections of the act defining the offense, and fixing the punishment, the words, "intoxicating liquor," are employed, as descriptive of the article, the sale of which is interdicted. We know of no rule in criminal pleading which requires, because another section of the statute has defined what is meant by the words, intoxicating liquor, that the pleader should aver that the intoxicating liquor charged to have been sold, comes within the definition thus given. The Legislature, in the prohibitory sections, have used the words, "intoxicating liquors," with reference to the definition given of them in the second section; and the pleader, we think, may well use them in the same manner.

If, on the trial, it should not appear that the article sold was an intoxicating liquor, as defined by the second section

Nov. Term, of the act, there would, of course, be a failure of proof, and
1861. the accused would be entitled to an acquittal.

WYNNE
v.
GLIDEWELL.

Per Curiam.—The judgment is affirmed, with costs.

James T. Embree, for the appellant.

James G. Jones, Attorney General, for the State.



WYNNE and Another v. GLIDEWELL and Another.

A debtor in failing circumstances may prefer his creditors, and may assign the whole of his property for the benefit of a single creditor, in exclusion of all others, or he may distribute it in unequal proportions among a part, or the whole, of his creditors; but in doing so he must act in good faith, without any purpose of defrauding such of them as are not preferred. The declarations of the debtor, made after the execution of an assignment for the benefit of his creditors, can not be given in evidence against the assignee, to defeat his right to the property.

In suits to set aside the transfer or assignment of property, on the ground of fraud, the question of fraudulent intent is one of fact, and not of law, and the jury are the exclusive judges of the entire question; not only of the effect and weight of the circumstances adduced to prove such intent, but also whether the facts proved really amount to circumstances conducing to show it; and hence an instruction from the Court that certain circumstances tend to prove a fraudulent intent, is erroneous.

Thursday,
December 12.

APPEAL from the *Franklin* Common Pleas.

DAVISON, J.—The appellants, who were the plaintiffs, brought this action against *Glidewell* and *Robeson* for the recovery of personal property, alleged to have been by them unlawfully taken, and wrongfully detained. The record discloses these facts: *Henry Shaffer*, a failing debtor, on April 3, 1858, by deed of assignment, transferred to the plaintiff, in trust for the payment of debts, his real and personal property, embracing his tanyard and stock in trade connected therewith, consisting of leather, hides, tanned and untanned, implements for tanning and currying, and every other species of personal property in any wise necessary in carrying on the business of tanning, &c. The deed sets forth what purports

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to be a schedule of the debts existing against the assignor, and divides certain of them into six classes, pointing out the order in which they are to be paid, and then provides that the residue be paid *pro rata*. Upon the delivery of the deed, the plaintiffs took possession of the property assigned, and proceeded at once to convert the same into money, for the purposes therein designated. Prior to the making of the deed of assignment, *Robeson*, one of the defendants, had commenced an action in the *Franklin* Common Pleas, against *Shaffer*, the assignor, which was pending at the time the deed was made, and in which he, *Robeson*, on *April* 6, 1858, recovered a judgment against *Shaffer* for \$126. After this, on *April* 14, in the same year, execution was issued upon that judgment, and placed in the hands of the defendant *Glidewell*, the sheriff, who, by virtue of it, levied upon the property in controversy, being a portion of the same transferred by *Shaffer* to the plaintiffs. Proper issues having been made, the cause was submitted to a jury, who found for the defendants. Motion for a new trial denied, and judgment on the verdict.

The causes for a new trial are thus assigned: 1. The verdict is unsustained by the evidence. 2. The Court in its charge misdirected the jury. It is assumed, in argument, that certain instructions moved by the plaintiffs, and refused by the Court, should have been given to the jury; but as the rulings upon them are not referred to in the motion for a new trial, the points which they involve are not properly before us. *Kent v. Lawson*, 12 Ind. 675.

The charges given, and alleged to be erroneous, read thus: 1. "If the jury believe that *Shaffer* made the assignment, purposing to defraud *Robeson*, and prevent him from collecting the debt due to him from the assignor, the assignment would be void as to *Robeson*, and the execution and levy will hold the property. 2. A debtor in failing circumstances has the right to make an assignment, and in marshaling his assets he may prefer any class of creditors he believes most entitled to such preference, but in doing so, he must deliver up all his property subject to execution, reserving not exceeding \$300. And in marshaling his

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assets, he can not exclude some creditors of the same dignity, from the preferred class, for the purpose of defrauding them of their debts, by putting them in a class not preferred. 3. If *Shaffer*, in making the assignment, intended to defraud any person to whom he was indebted, in classifying such indebtedness, by excepting them from the preferred class to which they belonged, the assignment would be fraudulent and void. 4. Fraud is never presumed, but is required to be proven by the party alleging it." In the present case, the fact that the deed of assignment was made on the evening preceding the opening of the Court in which *Shaffer* had been sued by *Robeson*; the fact that on the day he made the deed, he denied to a creditor that he was making an assignment; the fact that he continues in possession of the property, under pay of the assignees, and the statements made by him to *George Berry*, are all circumstances tending to prove a fraudulent intent; and if the jury believe them true, and they have not been explained away, the jury would be justified in declaring the assignment void, so far as the present suit is concerned.

In reference to the first, second and third instructions, it may be assumed that a debtor in failing circumstances has a right to prefer his creditors. He may assign the whole of his property for the benefit of a single creditor, in exclusion of all others, or he may distribute it in unequal proportions among a part or the whole of his creditors. Burrill on Assignments, 98, *et seq.*; 1 Am. Lead. Cases, 95. This exposition is, in effect, conceded by the instructions, but they assume that if the purpose, in making the assignment, be to defraud one or more creditors, by putting him or them in an unpreferred class, the assignment would be void.

If the terms, "to defraud," as used in the instructions, mean to defeat the collection of a debt or debts, and we think they do, then the direction given to the jury is not objectionable; because a failing debtor, though he may prefer his creditors, must, in doing so, act in good faith, without any purpose of defrauding such of them as are not preferred. We are not inclined to hold these instructions erroneous.

The fourth instruction, as has been seen, alludes to certain

statements made by *Shaffer* to *George Berry*, "as a circumstance tending to prove a fraudulent intent in making the assignment." The evidence shows that these statements were made after the transfer of the property to the plaintiffs. And, in consequence, the instruction, so far as it relates to such statements, is, in our opinion, erroneous; because it is well settled that the declarations of a party to a sale or transfer, going to destroy or take away the vested rights of another, can not, *ex post facto*, work that consequence. *Phenix v. Dey*, 5 Johns. 412. Indeed, the cases on this subject are uniform, and all seem to agree "that declarations made by the person under whom the party claims, after the declarant has departed with his right, are utterly inadmissible to affect any one claiming under him." 1 Phil. Ev., 4 Am. Ed., pp. 314-322, note 104; *Alexander v. Gould*, 1 Mass. 165; *Clarke v. Waite*, 12 *id.* 439. Thus, "admissions made by an insolvent debtor, subsequently to his insolvency, are not admissible against the trustees of his estate." 1 Esp. Rep. 330; *Doe v. Moore*, 4 Blackf. 445.

There is, however, another ground upon which the instruction seems to be erroneous. It recites certain facts alleged to have been proved, and then tells the jury that the facts so recited are "all circumstances tending to prove a fraudulent intent." In cases of this sort, the question of such intent is a question of fact, and not of law. 1 R. S., § 21, p. 303; 4 Ind. 388; 12 *id.* 64-70. This, it seems to us, makes the jury the exclusive judges of the entire question of intent; not only of the effect and weight of the circumstances adduced to prove it, but whether the facts proved really amount to circumstances conducing to show it. It is therefore evident, that the Court, in pointing out to the jury the "circumstances tending to prove a fraudulent intent," committed an error.

Per Curiam.—The judgment is reversed, with costs. Cause remanded, &c.

Geo. Holland and *C. C. Binkley*, for the appellants.

J. H. Farquhar, *W. G. Quick* and *W. P. Quick*, for the appellees.

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BUTLER and Others v. THE STATE.

BUTLER
v.
THE STATE.

Information against three persons, described as the "*Trustees of the Wabash and Erie Canal*," for a nuisance, in failing to keep a bridge in such repair as to be safe for public travel.

Held, that the information against the "trustees" was bad, for not showing that the road named, or the bridge, crossed the canal; the averment in the information that it was their duty to keep it in repair being a mere conclusion of law.

Held, also, that the information against the defendants, as private individuals, was bad, for not showing by what right they became possessed of the bridge, and how it became their duty to keep it in repair.

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December 12.

APPEAL from the *Daviess* Common Pleas.

WORDEN, J.—Information against the appellants for a nuisance. Motion to quash overruled. Trial, conviction, and judgment.

The information charges that "at the county of *Daviess*, &c., on May 1, 1860, *Charles Butler, Thomas Dowling and Richard Raleigh*, trustees of the *Wabash and Erie Canal*, did then and there have and possess a certain common bridge, known as the *Maysville* bridge, situate and being in said county and State, on and across the public highway leading from the town of *Washington* to *Maysville*, in said county, used by and for the citizens of said county and State, traveling said road on foot, and with their horses, coaches, carts and other carriages, to go, return, pass, repass, ride and labor at their free will and pleasure; and that said bridge, on May 1, 1860, and continuously thereafter up to the time of filing this information, in said county, was, and yet is, very ruinous, broken, dangerous, and in great decay, for want of upholding, maintaining, amending and repairing the same, so that the citizens aforesaid, upon and over the said bridge, with their horses, coaches, carts and other carriages, could not, during the time aforesaid, nor yet can, go, return, pass, repass, ride and labor, as they heretofore were accustomed to do, and still of right ought to do, without great danger of their lives and the loss of their goods, to the great damage and common nuisance of all the citizens in the vicinity, upon and over the said bridge going, returning,

passing, repassing, riding and laboring, to the annoyance and common nuisance of the citizens of said State, and against the peace and dignity of the State of *Indiana*; that the said bridge is not within any city or town corporation, and is not under the control and supervision of any road supervisor, and that the said *Butler*, *Dowling* and *Raleigh*, trustees of the *Wabash and Erie Canal*, ought to make and repair, rebuild and amend the said bridge, when, and so often as, it should or shall be necessary, according to the form of the statute in such case made and provided."

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The trustees of the *Wabash and Erie Canal* are required to "erect, construct, and keep in good repair, suitable bridges over all State and county roads crossing, or that may hereafter cross, said *Wabash and Erie Canal*." Acts 1847, § 30, p. 33.

Whether a failure to discharge this duty subjects them to a criminal prosecution, and if so, whether it should be as for a nuisance, are questions which we need not decide. The information is totally defective, viewing the prosecution as one for failing to discharge a duty as trustees, because it does not allege, that the bridge, or the road named, crossed the *Wabash and Erie Canal*. There is, therefore, nothing in the information showing that it was the duty of the trustees to keep the bridge in repair. It is averred, to be sure, that such was their duty, but this is a mere conclusion of law, without any statement of facts from which such conclusion can be drawn.

But it is claimed by the State, that the prosecution should be regarded as against the defendants as private individuals; that the words "trustees," &c., may be regarded as merely descriptive of the persons. This view, however, will not render the information good. The defendants are not charged with erecting, or continuing and maintaining any nuisance. It is charged, to be sure, that they possessed a bridge across a highway, which was out of repair. The gist of the offense is the neglect to keep the bridge in repair. How, or by what right, the defendants became possessed of the bridge does not appear, neither do any facts appear making it the

Nov. Term, duty of the defendants, as private individuals, to keep it in
1861. repair.

ALSOP
v.
WILEY

The motion to quash should have prevailed.

Per Curiam.—The judgment is reversed. Cause re-
manded, &c.

John P. Usher, for the appellants.

James G. Jones, Attorney General, for the State.

ALSOP and Another, Administrators of VERY v. WILEY,
Administrator of TAYLOR.

In the year 1858, *A.*'s administrator instituted a suit against *B.*, then in life, upon five promissory notes. Pending the suit *B.* died, and the same was revived against his administrators, and judgment taken against them for the amount of the principal and interest of the notes. The administrators of *B.* having resigned, administrators *de bonis non* were appointed, who instituted proceedings to review the judgment, alleging that there existed a valid defense to the notes to the amount of \$300; that they had found among the papers of their intestate a receipt for that amount, as a credit on said note, which had not been allowed in taking said judgment: that the said receipt was discovered since the judgment, and since the last term of the Court, and was previously unknown to the plaintiffs. In another paragraph, it was alleged that there was error of law in taking the judgment, in this, that judgment was entered for a larger amount than was claimed in the plaintiff's complaint. On the trial, it was shown that *B.* had appeared to the suit on the notes, in his lifetime, but had pleaded no defense under which the receipt in question could have been given in evidence. On the hearing, the Court ordered a sum equal to the excess of the judgment above the amount demanded in the complaint to be credited thereon, as of the date of the judgment, and found against the plaintiff: as to the credit of \$300 claimed.

Held, that as there was no evidence tending to show that the receipt had ever been lost or mislaid, it must be inferred that by reasonable diligence it might have been discovered, and the absence of such proof, together with the fact that *B.*, in his lifetime, made no such defense, justified the finding of the Court.

Held, also, that the order of the Court modifying the original judgment was in exact conformity with the statute. Nov. Term, 1861.

APPEAL from the *Floyd* Circuit Court.

DAVISON, J.—This was a proceeding, under the statute, to review a judgment. The appellants were the plaintiffs, and the appellee the defendant. The complaint consists of two counts. The first count alleges these facts: In the year 1855, *Wiley*, as such administrator, instituted a suit in the *Floyd* Circuit Court against *Lawson Very*, then in life, upon five promissory notes. During the pendency of the action, *Lawson Very* died, and the suit was revived and continued against *Gamaliel Garretson* and *Eliza Very*, the administrators of *Very's* estate. At the *October* term, 1856, of said Court, judgment was recovered against the administrators upon the notes, for \$4,524.62. Since the rendition of this judgment, the plaintiffs have been appointed administrators *de bonis non* of *Very's* estate. Before, and at the time, the judgment was recovered, there existed a valid defense of \$300 to the suit upon the notes, which sum had been paid by *Very*, in his lifetime, to said *Wiley*, as evidenced by a receipt in these words:

“JEFFERSONVILLE, *July* 16, 1855.

“Received of *Lawson Very*, \$300, to be credited as interest on notes held by me as administrator of *G. W. ———*, deceased, against said *Very*, and in favor of *G. W. Taylor*.

(Signed) “JOHN F. WILEY.”

This receipt was not pleaded as a defense to said suit, and the judgment was obtained for the amount above stated, without any credit for the \$300 therein specified. It is averred that the receipt has been discovered since the rendition of said judgment, and since the last term of this Court, and was previously unknown to these plaintiffs; and that this complaint would have been sooner filed, but the plaintiffs hoped that the defendant would credit the \$300 on the judgment, which he has utterly refused to do so. The second count charges that *Wiley*, in his complaint on said notes, demanded judgment for only \$4,500, while the Court rendered

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Nov. Term, judgment therein for \$4,524.62, exceeding the demand, 1861. \$24.62. The relief prayed is, that the judgment be re-

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versed, so far as to have entered upon it a credit equal to the amount of the receipt, and the amount over the demand. The complaint is verified by the oath of *James M. Alsop*, one of the plaintiffs.

Proper issues having been made, the cause was submitted to the Court, who, "as to the issue joined upon the first count of the complaint, found for the defendant, and that said first count contained no cause of action; and as to the issue joined upon the second count, the Court found that an error of law did occur, as therein alleged, &c. Plaintiffs moved for a new trial, but their motion was overruled, and judgment was given in accordance with the finding, &c.

The only question to be considered is, could the defendants to the action upon the notes, by reasonable diligence, have discovered the existence of the receipt before judgment was given against them? The Court, sitting as a jury, has, in effect, decided this question; and we are not authorized to disturb that decision, unless the record shows it to be plainly erroneous. The evidence given in this cause is before us. It consists of the receipt, the record of the proceedings in the original action against *Lawson Very*, and the testimony of *Garretson*, one of the administrators, against whom the judgment in that action was rendered. The record in evidence proves that *Very*, after he was sued, and before his death, appeared to the suit and pleaded; but in his pleading set up no defense relative to the receipt, or under which it could have been given in evidence. *Garretson* testified that after he became administrator, and before the judgment was rendered against him and his co-administrator, he examined the papers belonging to *Very's* estate; "that he employed counsel, practising in the Court, to look into the case; that he understood the action was founded on notes against the decedent, *Lawson Very*; that he interposed no defense thereto; and that he never made any examination to see if there was any defense to that action. Upon examining the receipt in this case, witness says that he had never seen or known any thing of it, before the then, term of the Court."

It may be noted that there is no evidence tending to prove that the receipt had been mislaid, or that it was accidentally discovered, in a place where the decedent had not usually kept such papers; and, in the absence of such proof, it may be inferred that while the suit was pending it was in the hands of the administrators, or in a place where, by proper diligence, they could have readily discovered it. And, moreover, the existence of the receipt was obviously known to *Very*, when he pleaded to the action; and having failed to set it up in his pleading, we are allowed to presume that he did not regard it as a valid defense. It seems to us that the case made by the evidence authorized the finding of the Court. But it is argued, "that a new trial having been granted, the whole case was opened, without regard to the particular ground upon which the judgment was opened." This argument is unsustained by the record. The Court, in its final order, simply adjudged that "the judgment mentioned in the complaint should be credited with the sum of \$24.62, as of the date of *October 30, 1856.*" No new trial is granted, nor is the judgment opened. The judgment in this case is doubtless in exact conformity with the statute, which says: "Upon final hearing" of such review, "the Court may reverse or affirm the judgment, in whole or in part, or modify the same, as the justice of the case may require."

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1861.

HAYER
v.
THE STATE.

Per Curiam.—The judgment is affirmed, with costs.

J. & A. B. Collins, for the appellants.

R. Crawford, for the appellee.

HAYER v. THE STATE.

An indictment for selling liquor in a less quantity than a quart must specify the quantity sold; and this is not done with sufficient accuracy, where the quantity is charged to have been "two glasses."

APPEAL from the *White* Circuit Court.

WORDEN, J.—Indictment against *Hayer* for retailing. Motion to quash overruled, and exception. Trial and conviction.

Thursday,
December 12.

Nov. Term, 1861. The indictment charges that the defendant "did unlawfully sell intoxicating liquors to *John B. Bunnell*, in a less quantity than a quart, to wit, two glasses," &c. The objection to the indictment is, that it does not set forth the quantity sold. MILLIKIN v. ARMSTRONG. In *Brutton v. The State*, 4 Ind. 601, it was held, under the statute of 1853, that an information was defective which charged that the defendant sold by less quantity than a gallon, without setting forth the quantity. *Vide*, also, *Cool v. The State*, 16 Ind. 355.

The addition of the words, "to wit, two glasses," does not make the quantity sold any more certain. Two glasses are not necessarily less than a quart. Indeed, a glass of liquor is no definite quantity, any more, as is remarked by counsel for the appellant, than a tub, or a pail, or a kettle full. A glass is no definite quantity known to the law, nor, as far as we are aware, to the commercial or drinking world.

Per Curiam.—The judgment is reversed. Cause remanded, &c.

Alfred Reed, for the appellant.

John L. Miller, for the State.

MILLIKIN and Another v. ARMSTRONG and Others.

The lien of a mechanic for work done or materials furnished in the construction of a house, only takes effect from the time of filing his notice in the recorder's office.

Fixtures used in, and attached to, a building used for manufacturing purposes, will pass by a mortgage of the freehold.

Whether a mechanic's lien, like a vendor's, would be waived by taking collateral security, is regarded as doubtful; but certainly the taking of the note of the debtors, in their co-partnership name, indorsed by some of them individually, would not waive the lien, as no additional security would be acquired.

Thursday,
December 12.

APPEAL from the *Jefferson* Circuit Court.

WORDEN, J.—Complaint by *George* and *Henry H. Armstrong*, against *O'Neal Bayley*, *James S. Irwin* and *Charles*

E. Douglas, partners, doing business under the name and style of *The Madison Starch Co.*, to enforce a mechanic's lien upon certain premises described and called the *Madison Starch Factory*. In addition to the above named defendants, *Robert B. Millikin* and *Benjamin J. Adams*, the appellants herein, and *John S.* and *Reuben E. Neal*, partners, &c., *Alexander White* and *Robert Pattie*, partners, &c., *James Davidson* and *William S. Driggs*, partners, &c., *Cochran and Sons*, and *Joseph Farnsworth* were made defendants.

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1861.

MILLIKIN
v.
ARMSTRONG.

It appears that the plaintiffs, the *Armstrongs*, acquired their lien on the premises on *August 11, 1857*, by then filing their notice in the recorder's office. On the next day, *August 12, 1857*, the said *Charles E. Douglas*, in whom the title to the premises had theretofore been, conveyed the same to said *Millikin*. From the date of the deed to *Millikin*, for the period of one year, the said *Bayley & Irwin* held the premises as tenants of *Millikin*; at the expiration of which time they surrendered the same up to him. *Millikin* executed a mortgage on the premises, bearing date *October 20, 1857*, to the said *Adams*, to secure the payment of \$40,000, but it was not acknowledged until *November 10*, following, and was not recorded until the 29th of the same month.

Adams appeared, and by way of cross complaint asked a foreclosure of his mortgage. The other defendants, the *Neals*, *White & Pattie*, *Davidson & Driggs*, *Farnsworth*, and *Cochran & Sons*, each set up and sought the benefit of liens by them acquired upon the same premises. We understand from the brief of counsel that the claim of *Cochran & Sons* is not objected to, therefore the case as to them will be no further noticed.

The Court found in favor of the parties so setting up their liens, and that they all had priority over the mortgage of *Adams*, and ordered certain portions of the premises and fixtures to be sold, as personal property, to satisfy said liens, &c. The Court also found in favor of *Adams* the sum of \$45,360, on his mortgage, and ordered the premises to be sold, &c.

The notice of the *Neals*, *White & Pattie*, *Davidson & Driggs*, and *Farnsworth*, were not filed in the recorder's office

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MILLIKIN
v.
ARMSTRONG.

until after the mortgage of *Adams* was executed and recorded, and had not priority over the mortgage. The mortgage being recorded within the time required by law, would probably take effect as a lien from the time of its delivery, but this point need not be decided, as it was recorded before the notices of lien were filed. The lien of a mechanic, &c., only takes effect from the time of filing his notice in the recorder's office. *Green v. Green*, 16 Ind. 253; *Walters v. Waldo*, at the present term.

The mortgage to *Adams* conveyed to him the entire premises, including the fixtures, &c., ordered to be sold as personal property to satisfy some of the liens. *Sparks v. The State Bank*, 7 Blackf. 469.

The lien of the *Armstrongs* was perfected before there was any transfer of the property. The only objection made to their claim is, that they took a note signed by *Bayley*, *Irwin* and *Douglas*, in the name of the *Madison Starch Co.*, payable to *Bayley & Co.*, and by the latter indorsed to them. *Bayley & Co.*, were the same *Bayley* and *Irwin*, who composed two of the three members of the starch company. It is claimed that by this arrangement the *Armstrongs* procured additional security for the payment of their debt, and thereby waived their lien. Whether a mechanic's lien, like a vendor's, would be waived by taking collateral security, we need not decide, but the point is regarded as doubtful. The circumstances here shown would not, in our opinion, be a waiver even of a vendor's lien. By the arrangement made, the *Armstrongs* had no one bound as indorsers of the note, except those that were bound as makers, who owed the claim. No additional security was acquired, and the lien was not thereby waived.

Per Curiam.—That portion of the judgment which orders that the claims of the *Neals*, *White & Pattie*, *Davidson & Driggs*, and *Farnsworth*, shall have priority over the mortgage of *Adams*, and which orders any portion of the property to be sold to satisfy those claims, is reversed, at the costs of those parties. Otherwise the judgment is affirmed.

C. E. Walker, for the appellants,

H. W. Harrington, for the appellees.

O'CONNELL v. GILLESPIE.

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1861.O'CONNELL.
v.
GILLESPIE.

The summary remedy furnished by § 12, 2 R. S. 1852, p. 492, for recovering the possession of land, before justices of the peace, was only intended to be given in cases where there has been an unlawful and forcible entry, or where the entry has been peaceable, but the detention is unlawful and forcible. The word "or," in the first line of the section, being evidently used in the sense of "and."

APPEAL from the *Putnam* Circuit Court.Thursday,
December 12.

WORDEN, J.—This was an action by *Gillespie* against *O'Connell*, for the forcible entry and detainer of a certain town lot, brought before the mayor of the town of *Greencastle*, and appealed to the Circuit Court. Trial; verdict and judgment for the plaintiff.

The defendant asked a charge to the substantial effect that in order to entitle the plaintiff to recover, it was necessary that the defendant's entry should have been unlawful and forcible, or, having peaceably entered, that he should have forcibly detained the premises. This charge was refused, and the Court charged that the plaintiff must prove "that the defendant either unlawfully or forcibly took possession, and detained the possession from the plaintiff either peaceably or forcibly; or, if the defendant is in possession, having peaceably obtained the possession, that he both unlawfully and forcibly keeps the possession against the plaintiff, he having the right to the possession."

The statute on the subject is as follows: "Any person who shall make unlawful or forcible entry into lands, and shall either peaceably or forcibly detain the same, against any person having right to possession thereof, or any person having peaceably obtained the possession of lands, who shall unlawfully and forcibly keep the same, against any person having the right to possession thereof, may be ousted from such premises," &c. (2 R. S. 1852, § 12, p. 492.) If the first branch of this provision is to be construed literally, no error was committed in refusing the charge asked, or in giving the one given. With such construction, the action is maintainable although there be no force either in the entry or detainer. The provision might be read, leaving out

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O'CONNELL detain the same, against any person having right to possession thereof may be ousted," &c.

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GILLESPIE.

But this literal interpretation fails to meet the evident intention of the Legislature, as gathered from the entire provision, as well as from cotemporaneous and previous legislation. This construction would give justices of the peace jurisdiction in all actions for the recovery of real estate, where one unlawfully entered the land of another and detained it from him. This is opposed by cotemporaneous legislation, which does not give justices jurisdiction to try titles to real estate. In all previous legislation on the subject of forcible entry and detainer, the statutes required that in order to give justices jurisdiction there should be force either in the entry or detainer. R. S. 1831, p. 265; R. S. 1838, p. 307; R. S. 1843, p. 822.

This construction is inconsistent with the latter branch of the provision in question. An entry may be unlawful, but at the same time peaceable. By the latter branch, where the entry is peaceable, the detention must be unlawful and forcible. We think it clear that the Legislature intended to furnish this summary remedy only in cases where there is an unlawful *and* forcible entry, or where the entry is peaceable, (without force,) but the detention is unlawful and forcible. The word "*or*," in the first sentence of the provision, is used, evidently, in the sense of "*and*." The provision may be read as follows: "Any person who shall make unlawful *and* forcible entry into lands, and shall either peaceably or forcibly detain the same," &c. may be ousted. This renders the provision intelligible and consistent, as a whole, and expresses what the Legislature evidently intended.

Per Curiam.—The judgment is reversed, with costs. Cause remanded, &c.

Crane and Mason, for the appellant.

Williamson and Daggy, for the appellee.

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1861.

FRIERMOOD and Others v. PIERCE, Administrator of ROUSER.

**FRIERMOOD
v.
ROUSER.**

A. sold to *B.* a tract of land for \$1,200, of which one half was paid in cash, and three notes given for the residue. *A.* indorsed one of the notes to a third person, who sued upon it, but was defeated because the deed tendered by *A.* was not executed by his wife. An agreement was then made between *A.* and *B.*, by which the latter agreed to accept the deed, without the wife's signature, and to pay to *A.* the amount of the note which had been sued upon, and for which *A.* was liable on his indorsement, and also one other of the three notes, the third being at the time surrendered to him by *A.*

Held, that the conveyance of *A.*, without the wife's signature, was a sufficient consideration to support the agreement.

APPEAL from the *Grant* Circuit Court.

Thursday,
December 12.

WORDEN, J.—Action by *Pierce*, as administrator of the estate of *Peter Rouser*, deceased, against *George, Jacob and William Friermood*. Issue; trial by the Court; finding and judgment for the plaintiff. There were several paragraphs in the complaint, but they were finally all withdrawn except the first and fourth. The first was upon a promissory note made by the defendants to the plaintiff's intestate, and no question arises upon it. The fourth sets up, in substance, the following facts: *Rouser* had sold to one of the *Friermoods* a certain piece of land for the sum of \$1,200, six hundred of which was paid down, and the defendants executed to *Rouser* three notes, each for \$200, for the residue of the purchase money; and *Rouser* executed a bond for the conveyance of the land. *Rouser* afterward indorsed one of the notes to one *Henry Pierce*, who sued the defendants upon the same, and was defeated in his action upon the ground that *Rouser's* wife had an outstanding right of dower in the premises, and had not signed the deed tendered by *Rouser* to the purchaser. Afterward, the parties agreed that the title bond should be given up, and the deed accepted without the signature of *Rouser's* wife, which was accordingly done; the plaintiff was to surrender one of the notes, and the defendants were to pay the other note, and also \$200 to *Rouser*, for which sum he was liable to *Pierce* on his indorsement of the other note. The first paragraph of the complaint is based upon

Nov. Term, the note thus stipulated to be paid, and the fourth seeks to
1861. recover the \$200, thus agreed upon.

FRIERMOOD
V.
ROUSER.

One of the points made by the appellants for a reversal, is the overruling of a demurrer to the fourth paragraph. A demurrer to it was overruled, but we find no exception in the record to the ruling, hence, we need not inquire whether the ruling was correct, or not.

A new trial was moved for on seven grounds: The *first* relates to the ruling on the demurrer, which has been noticed. The *second* is, that the Court erred in admitting the testimony of *Oliver Lillard*. The record shows no exception taken to the admission of his testimony. The *third*, *fourth*, *fifth* and *seventh* relate to the sufficiency of the evidence to sustain the finding. The evidence strongly tends to sustain the finding, and we can not reverse the judgment on these grounds. The *sixth* is, that the Court erred in excluding evidence offered by the defendants. This point is not relied upon, or referred to, in the brief of counsel for the appellants.

After the finding, the defendants moved in arrest of judgment on the fourth paragraph, on the ground of its insufficiency, the Court having found for the plaintiff on both.

One of the points relied upon on the motion in arrest is, that it does not appear that the promise was made in the lifetime of *Rouser*, the plaintiff's intestate. It is not directly alleged that it was made in his lifetime, but is alleged that it was made to one *Oliver Lillard*, as his agent. This is good enough after verdict. It may be reasonably intended that *Rouser* was alive, or he would not have had an agent.

The principal objection to the paragraph is, that it does not disclose a sufficient consideration for the agreement to pay the \$200. The consideration seems to be entirely sufficient. The conveyance of the land, without the signature of *Rouser's* wife, was certainly a good consideration for the agreement made by the defendants. The purchaser would have been entitled to receive an unincumbered title, but he might well agree to pay a less sum than was stipulated for

for such title, and take the conveyance of *Rouser* himself, and run the risk of any claim on the part of his wife. Nov. Term, 1861.

The motion in arrest was properly overruled.

SCHAEFFER

A point is made on the evidence, that may be further noticed. The land was bought by one of the defendants, and the others were sureties on the notes. In making the subsequent arrangement, the one who bought the land acted as the agent for the others, and made the new agreement on behalf of himself and them; and the evidence tends to show that he was authorized by them to do so.

V.
FITHIAN.

The evidence as to the authority is not very clear, but sufficient, we think, to sustain the finding. It is objected that the defendant's promise was not in writing. No reason has been stated, nor is any perceived, why it should have been. We find no error in the record for which the judgment should be reversed.

Per Curiam.—The judgment is affirmed, with 5 per cent. damages and costs.

John Brownlee, for the appellants.

H. D. Thompson, A. Steele and R. T. St. John, for the appellee.

SCHAEFFER and OTHERS v. FITHIAN and Others.

Suit against *A. and B.*, and their wives, to set aside a conveyance of real estate, made by *C.* to the wives of the said *A. and B.* The complaint alleged that the said *A. and B.*, being partners, were indebted to the plaintiffs in a large sum, upon which a judgment had been recovered against them; that after the making of said debt, and before the recovery of the plaintiff's judgment, the said *A. and B.* had sold a large stock of merchandise owned by them to *C.*, and had received in part payment a conveyance of certain real estate; that after the conveyance by *C.* to them, they had, for the purpose of defrauding their creditors, delivered up said deed to *C.*, and procured him to execute a deed to their wives. Answer, by *A. and wife*, denying all fraud, and all knowledge of the execution of any deed by *C.* to *A. and B.*, and averring that the said *A.*

17 463
181 230

17 463
148 596

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159 619

17 463
166 474

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v.
FITHIAN.

had received from the estate of his wife \$900, which he had several times invested in her name and for her benefit; and the same coming again into his hands, he invested the same in goods for the firm of *A.* and *B.*, where the same remained, as the separate money of his wife, until the sale of said goods to *C.*; that the conveyance of *C.* to her was in consideration of said debt, and to discharge the same, and was so accepted. *B.* and wife answered, denying all fraud, and also all knowledge of any conveyance by *C.* to *A.* and *B.*, and averring that the father-in-law of the said *B.* had advanced to him and his wife \$1,500, for which he held their joint note, and that at the time of the sale of the goods to *C.*, it was agreed between him and his said father-in-law, that the latter should receive one half of the land to be conveyed by *C.*, in discharge of said debt, and that said land was, by the direction of his said father-in-law, conveyed to his daughter, the wife of *B.*, as an advancement, in pursuance of said agreement.

Held, that the answer of *A.* and wife sufficiently excluded the idea that the money received by *A.* from his wife became his by virtue of his marital rights, and that this indebtedness to the wife constituted a good consideration for the conveyance.

Held, also, that the answer of *B.* and wife showed a sufficient consideration for the interest conveyed to her, and the transaction, in the absence of fraud, was valid.

Held, also, that the doctrine that partnership assets must first be applied to the payment of partnership debts, does not apply to cases where the partnership still exists, but only to cases where the principles of equity are brought to interfere in the distribution of partnership property among the creditors; the partners having a legal right, during the continuance of the partnership, to dispose of their property as they please.

Held, also, that if a deed was once executed and delivered by *C.* to *A.* and *B.*, the surrender of the deed to the former would not revest the title in *C.*; but as the complaint did not aver that such deed had ever been recorded, and as the answers of the wives denied any knowledge of its ever having been made, they must be regarded as innocent purchasers without notice.

Held, also, that under 1 R. S. 1852, § 16, p. 234, it is wholly immaterial whether the subsequent conveyance was made before or after the expiration of the ninety days limited for the recording of the first; and as to the prior purchaser, it is immaterial whether the subsequent conveyance is ever recorded.

Thursday,
December 12.

APPEAL from the *Randolph* Circuit Court.
WORDEN, J.—This was an action by the appellees against the appellants. The complaint alleges, in substance, that the defendants, *Valentine* and *David W. Schaffer*, who were

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v.
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partners in business, in *March*, 1858, became indebted to the plaintiffs, who were also partners in business, in the sum of \$879, for goods sold and delivered. That in *February*, 1859, the plaintiffs recovered judgment against said *Valentine* and *David W.* for the amount of said indebtedness, in the Superior Court of *Montgomery* county, in the State of *Ohio*; that an execution issued upon the judgment has been returned unsatisfied, and that the defendants have no property in the State of *Ohio* subject to execution. That on *November* 13, 1858, the said *Valentine* and *David W. Schaeffer*, who then held and owned, as such partners, a large amount of dry goods, of the value of \$10,000, traded and exchanged said stock of dry goods to one *Handy D. Bowen*, and in part consideration therefor, received from *Bowen* certain real estate, situated in *Randolph* county, *Indiana*, which real estate is described in the complaint; that the land was received and estimated in the exchange as of the value of \$2,587, and was conveyed by deed from *Bowen* to *Valentine* and *David W. Schaeffer*. That said *Valentine* and *David W.*, for the purpose of defrauding their creditors, and particularly the plaintiffs, on *November* 13, 1858, returned and delivered up said deed of conveyance to said *Bowen*, and procured *Bowen* to make a deed for the same land to *Mary E. Schaeffer*, wife of *Valentine*, and *Frances Schaeffer*, wife of *David W.*, without any consideration from said *Mary E.* and *Frances*, or either of them, who continue to hold the apparent title, in fraud of the rights of the plaintiffs.

Prayer for judgment against *Valentine* and *David W.*, for the amount of the judgment recovered in *Ohio*, with costs and interest, and that the conveyance to *Mary E.* and *Frances* be set aside and held for naught, and that the land be sold to satisfy the debt.

The defendants all appeared and answered.

Mary E., in conjunction with her husband, answered, admitting the recovery of the judgment, as alleged, and the want of property in *Ohio* to satisfy it, and the conveyance of the land by *Bowen* to her and said *Frances*, but denying all fraud, and averring that the conveyance was made in good faith and for a valuable consideration. That in regard to

Nov. Term, 1861. *the interest of Mary E. in the premises, the facts are, that in October, 1853, the said Valentine received from her estate the sum of \$900, money belonging to her, and loaned the same to one Thomas Schæffer, taking a note for the same, payable to said Mary E.; that afterward, said Valentine received the money from said Thomas, and invested the same with one Jonathan Wike, as the money of his said wife; that afterward, in 1856, said Valentine again received said money, and invested the same, as the money of his said wife, in goods for the said firm of V. & D. W. Schæffer; that said money so remained in said firm, charged to said Valentine as the separate fund of his wife, until the sale by said firm to Bowen; that during all this time the said sum of money was invested and kept as the separate property of said Mary E., and with the express agreement and understanding that the same should be accounted for by said firm to said Mary E.; that in pursuance of said agreement, the said firm of V. & D. W. Schæffer, at the time of the sale of their goods to Bowen, caused the real estate mentioned to be conveyed to said Mary E. and Frances Schæffer, jointly; that the conveyance was made at the request of Mary E., and was by her received in full payment of the debt due from the said firm to her; that it was so made and received by her in good faith, and without any design to defraud the creditors of said firm; and that the execution of any deed by Bowen to Valentine and David W. Schæffer, prior to the conveyance to Mary E. and Frances, was entirely unknown to them.*

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Frances Schæffer, in conjunction with her husband, answered, admitting the recovery of the judgment, &c., as in the answer of Mary E., but denying all fraud, and all knowledge of a previous conveyance by Bowen to Valentine and David W., and averring that the sale and conveyance to her and Mary E. was made in good faith, and for a valuable consideration; and alleging the facts to be, so far as her interests are concerned, that in 1851, and soon after her marriage with said David W., Jacob Browning, her father, advanced to her and her said husband the sum of \$2,500, to be used by them until demanded, for which they gave him

their promissory note, payable on demand; that on *February* 23, 1858, they paid said *Browning* \$1,000, by conveying to him a lot in *Dayton*, and took up the first note, and executed to *Browning* another for \$1,500, payable on demand; that on *November* 1, 1858, and at the time of the exchange of goods with *Bowen*, it was agreed between said *David W.* and *Browning*, that the land aforesaid should be conveyed to said *Frances* and *Mary E.* jointly, and that said conveyance, being to his daughter, should be a payment of said \$1,500, and that the same to that extent should be held and regarded as an advancement to said *Frances*. That in pursuance of said arrangement and agreement, said lands were so conveyed, and by means thereof the \$1,500 note was paid and discharged. That the execution of any deed from *Bowen* to *Valentine* and *David W.* was entirely unknown to said *Frances*, *Mary E.*, or to said *Browning*.

A demurrer was sustained to each of these answers, and the defendants excepted. Judgment, that the plaintiffs recover their debt of the defendants *Valentine* and *David W. Schaeffer*, and that the conveyance from *Bowen* to *Mary E.* and *Frances* be set aside, as to the creditors of said *Valentine* and *David W.*, and that the land be sold, &c.

The only question presented by the record is, whether the answers of *Mary E.* and *Frances* are sufficient.

We are of opinion that the answers were good, and that the demurrers thereto should have been overruled.

The money received by the husband of *Mary E. Schaeffer* was not received by virtue of his marital rights, as his own, but as hers, and for her benefit, and he became her debtor for the amount of it, unless he was entitled to receive the money as his own in virtue of their marriage. Whether, in case the husband was entitled to the money by virtue of the marriage, the receipt of it by him, not in his own right, but in hers, and for her benefit, made the money his own, leaving no indebtedness from him to her, and no right in her to have the money refunded, is a question similar to one upon which this Court was divided in opinion, in the case of *Miller v. Blackburn*, 14 Ind. 62. This question need not be decided in the present case. It is alleged in the

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pleading, that the husband "received from his wife's estate the sum of nine hundred dollars, money belonging to his wife," &c. This money may have belonged to the wife in two ways, at least. *First*: It may have been given or bequeathed to her *for her separate use*, in which case it would be hers, and not the husband's, in virtue of the marriage. *Miller v. Blackburn, supra*; 2 Story's Eq. Jur., § 1381. *Second*: It may have been hers by virtue of our statutes enlarging the rights of married women. The pleading, we think, is sufficient to exclude any conclusion that the money was the husband's in virtue of the marriage. The money, having for a time been loaned out, was finally invested in goods for the firm, and the firm, or said *Valentine*, (and we regard it as immaterial which,) became indebted to said *Mary E.* for the amount. This indebtedness was a good consideration for the conveyance. Leaving out of view, for the present, any question as to the effect of the previous conveyance by *Bowen* to *Valentine* and *David W.*, the case stands thus: the firm, or one member of it, owes *Mary E.* \$900; they trade goods to *Bowen* for some land, and wishing to pay the debt to *Mary E.* with the land, the conveyance is made directly from *Bowen* to her. This conveyance is supported by a sufficient consideration, and the transaction is valid, in the absence of fraud, which is denied in the answers.

The same may be said in reference to the answer of *Frances*. *David W.*, the husband of *Frances*, owed *Browning* \$1,500. *Browning* was the father of *Frances*, and he was willing to receive the land and have it conveyed to his daughter, as an advancement to her, for the \$1,500 debt. Here is a sufficient consideration, and the transaction, in the absence of fraud, which is denied, is valid.

But it is insisted that the partners could not apply the partnership effects to the payment of the debts of the individual members of the firm, until the partnership debts were paid. It is a general rule, that where a partnership is dissolved by the death or bankruptcy of one of its members, the partnership effects must be first applied to the payment of partnership debts, before creditors of the individual members of the firm can demand payment out of such

effects. *Holland v. Fuller*, 13 Ind. 195; *Weyer v. Thornburgh*, 15 *id.* 124. But this doctrine does not apply to cases where the partnership still exists, and the partners have a legal right to dispose of their property as they please. It is applicable only when the principles of equity are brought to interfere in the distribution of the partnership property among the creditors. *McDonald v. Beach*, 2 Blackf. 55; *Frank v. Peters*, 9 Ind. 343; Story on Part., § 361. The case of *McDonald v. Beach* is directly in point here.

Nov. Term,
1861.

SCHAEFFER
v.
FITHIAN.

We come now to the question whether the previous conveyance of the land by *Bowen*, to *Valentine* and *David W. Schaeffer*, vested the title in them, so as to render the subsequent conveyance to *Mary E.* and *Frances* inoperative and void. The surrender of the deed by *Valentine* and *David W.*, to *Bowen*, did not revest the title in the latter. This proposition is too clear to require a reference to the authorities. But the title of *Mary E.* and *Frances* is none the worse in consequence of such surrender and attempted re-investment of the title. The deed from *Bowen* to *Valentine* and *David W.* was not recorded. If recorded, that fact should have been shown, and can not be presumed. *Magee v. Sanderson*, 10 Ind. 261.

It is alleged in the answers that neither *Mary E.*, *Frances*, or *Browning*, had any notice of such conveyance. *Mary E.* and *Frances* must be regarded as innocent purchasers, having no notice of the previous conveyance. Our statute on the subject of registering conveyances, provides that "every conveyance or mortgage of lands, or of any interest therein, and every lease for more than three years, shall be recorded in the recorder's office of the county where such lands shall be situated; and every such conveyance or lease not so recorded within ninety days from the execution thereof, shall be fraudulent and void, as against any subsequent purchaser or mortgagee, in good faith, and for a valuable consideration." 1 R. S. 1852, § 16, p. 234.

Under this statute, it would seem to be wholly immaterial whether the subsequent conveyance was made before, or after, the expiration of the ninety days limited for the recording of the first; nor is it material, so far as the prior purchaser is

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1861.

SCOVILLE
v.
CHAPMAN.

concerned, whether the subsequent conveyance is ever recorded or not. We think, under this statute, that the conveyance to *Mary E.* and *Frances*, they having no notice, actual or constructive, of the prior conveyance, must be held to vest a valid title in them, the former conveyance, as to them, being void. This view is fully sustained by the case of *Orth v. Jennings*, 8 Blackf. 420. In that case, *John Jennings* being the owner of a piece of land, sold and conveyed the same to *Thomas Clawson*. The deed was not recorded within the time then fixed by law for the recording of deeds. Afterward, *Jennings* repurchased the land from *Clawson*, and the latter, instead of reconveying the land to *Jennings*, surrendered up to him the former deed to be canceled. Afterward, *Jennings* conveyed the land to the *State Bank*. It was held that although the surrender of the deed to *Jennings*, by *Clawson*, did not revest the title in *Jennings*, yet that the deed from *Jennings* to the bank was valid, in consequence of the deed from *Jennings* to *Clawson* not being recorded within the time limited.

Per Curiam.—The judgment that the plaintiffs recover their debt of the defendant's, *Valentine* and *David W. Schæffer*, is right, and need not be disturbed. But that portion of the judgment setting aside, and holding for naught, the conveyance from *Bowen* to *Mary E.* and *Frances Schæffer*, and ordering the land thus conveyed to be sold for the payment of the debt, is reversed, with costs. Cause remanded, &c.

Thos. M. Brown and *John J. Cheney*, for the appellants.
James G. Jones and *W. A. Peele*, for the appellees.

SCOVILLE and Others v. CHAPMAN.

In a proceeding to enforce a mechanic's lien, after the jury had been sworn, and the evidence heard, the Court permitted the plaintiff to enter a

dismissal as to some of the defendants, so far as a personal judgment was sought against them, but to continue them as parties to the proceedings to enforce the lien. Nov. Term, 1861.

Held, that there was no error in this.

Errors of law occurring on the trial, as in the refusal to grant a continuance, or in the admission of improper evidence, must be assigned in the motion for a new trial, or they can not be noticed on appeal.

Motion for a new trial upon the following grounds, viz., 1. "For irregularities in the proceedings of the Court, and abuse of discretion, by which the defendants were prevented from having a fair trial. 2. On account of accident and surprise, which ordinary prudence could not have guarded against. 3. Errors of law occurring at the trial, and excepted to."

Held, that the reasons assigned were too vague and indefinite to bring any question to the attention of the Court.

SCOVILLE
v.
CHAPMAN.

APPEAL from the *Lagrange* Common Pleas.

Thursday,
December 12.

WORDEN, J.—This was an action by the appellee against *Scoville, Jones and Shirts*, to recover for work and labor done, and materials furnished; and to enforce a mechanic's lien on a saw-mill and premises, on which the labor had been done, and for which the materials were furnished. Issues were formed, and the cause tried by a jury.

After the jury had been sworn, and the evidence offered, the plaintiff filed a dismissal of the cause as against *Jones and Shirts*, so far as it was sought to obtain a personal judgment against them, but retained them as defendants, so far as it was sought to enforce the lien on the premises. The defendants objected and excepted to such dismissal, the Court permitting the same to be entered. There was no error in this. Code, § 99; *Taylor et al. v. Jones*, 1 Ind. 1.

The effect of the proceeding was simply an abandonment of any pretended right to recover against *Jones and Shirts* a personal judgment for the labor and materials; claiming the right to enforce the lien as against them, however, and leaving them before the Court to protect their interests in the premises, if they had any. This, it seems to us, can not be error.

Verdict and judgment against *Scoville*, with the usual order enforcing the lien.

After the action above noted was had in relation to *Jones and Shirts*, an affidavit was filed, on which a continuance

Nov. Term, 1861. was applied for; but the application was overruled, and exception taken. There was no motion for a new trial on the

DEVOU
v.
HAM.

ground of error in refusing a continuance; hence, this point need be no further noticed. *Kent v. Lawson*, 12 Ind. 675.

It is objected that incompetent evidence was permitted to go to the jury. A new trial was not asked on this ground.

The reasons filed for a new trial are as follows: 1. "For irregularities in the proceedings of the Court, and abuse of the discretion of the Court, by which the defendants were prevented from having a fair trial. 2. On account of accident and surprise which ordinary prudence could not have guarded against. 3. Because the verdict is not sustained by sufficient evidence, and is contrary to law. 4. Errors of law occurring at the trial, and excepted to by the defendants."

The evidence is not in the record; hence, nothing further need be said in reference to the third reason. The other reasons were all too vague and indefinite to have brought any question to the attention of the Court below. *Barnard v. Graham*, 14 Ind. 322; *Medler v. Hiatt*, *id.* 405.

What we have said disposes of all the questions arising in the case.

Per Curiam.—The judgment is affirmed, with 5 per cent. damages and costs.

J. E. McDonald, A. L. Roache and R. Parrett, for the appellants.

A. Ellison, for the appellee.

DEVOU and Another v. HAM.

Suit upon a promissory note. Answer: that after the making of the note sued on, the defendant, being in failing circumstances, made an assignment for the benefit of his creditors; that afterward a majority of his creditors, the plaintiffs among the rest, agreed with the defendant in writing, that if he would execute to them his notes, with approved security, for one half of his several debts to them, they would discharge him from the whole amount of the original debts; that pursuant to said agreement he did execute said new notes, and that the same were accepted by all of the

creditors who executed such agreement, except the plaintiffs, and defendant brings said notes into Court, &c. Nov. Term, 1861.

Held, that the answer was good; as a single creditor, or any number of creditors, may compound with their debtor, so it is not made a condition in the agreement that all the creditors shall come into the same agreement.

DEVOU
v.
HAM.

APPEAL from the *Wayne* Common Pleas.

Friday,
December 13.

PERKINS, J.—Suit by *Devou* and *Rockwood* against *Ham*, upon two promissory notes, dated in *January*, 1858. The defendant answered in two paragraphs: 1. The general denial. 2. Specially, that after the execution of said note, viz., in *February*, 1858, he became in failing circumstances, and made an assignment of all his property to one *Joel Railsback*, for the benefit of his creditors; that afterward, in *September*, 1858, a majority of his creditors, the plaintiffs being among them, agreed with the defendant (*Ham*) in writing, that if he would execute to them, severally, his paper, with approved security, to the amount of one half of his several debts to them, they would release him from liability on, and discharge him from, the entire original debts; the said plaintiffs, however, being the last to sign the agreement, appended without the knowledge of the other parties, to their signature to the writing the condition, "if arranged in thirty days." This writing was not signed by *Ham*.

He further said in his answer, that he executed the notes, as agreed, for the plaintiffs and the other creditors within thirty days, but on offering them to the plaintiffs for their indebtedness they refused to receive them, while all the other creditors who entered into the arrangement did receive the notes executed for them, pursuant to the agreement, and executed the releases as stipulated, supposing the plaintiffs would do the same, as agreed; and he brings the notes prepared under the agreement into Court, &c.

Upon demurrer, the Court below held this paragraph of the answer sufficient. The plaintiffs excepted. They then replied in two paragraphs: 1. General denial. 2. Specially, that the agreement of settlement and release set up in the answer was obtained from the plaintiffs by the fraud of *Ham*, setting out the particulars, as misrepresenting his true condition as to amount of indebtedness, amount of

Nov. Term, 1861. *assets, &c.* Such representations might constitute fraud. Forsyth on Composition with Creditors, p. 27. This work constitutes a part of McKinley & Lescure's Law Library, vol. 1. The cause went to a jury, who found for the defendant; and, over a motion for a new trial, the Court rendered judgment on the finding.

DEVOUR
V.
HAM.

A bill of exceptions attempts to present questions upon the evidence, and upon instructions given and refused upon the trial of the cause.

The bill of exceptions does not show, by the use of the formula, "this was all the evidence given in the cause," that the evidence is of record, and the point is insisted upon by the appellee.

The trial of the cause was closed, and the judgment rendered, on *April* 20, 1858, and no time was given for the filing of a bill of exceptions. The bill of exceptions in the record was filed on *April* 29, 1858. It contains the instructions given and refused upon the trial. The plaintiffs asked four pages of instructions; they were refused in a body, and the plaintiff excepted generally to the act of refusal. The Court gave five pages of instructions, and the plaintiffs excepted generally to the act of giving them. No exception was taken to any single instruction.

The causes for a new trial were assigned as follows: 1. Irregularity in the proceedings of the Court, &c. The particular irregularity was not specified. It should have been. 2. The verdict is not sustained by the evidence. This we can not notice for want of the evidence. 3. The verdict of the jury is contrary to law. Wherein, is not pointed out. It should have been. 4. Error of law occurring at the trial, &c. No particular error is specified. One should have been. 5. The Court erred in the charges given and refused, &c. No particular charge is specified, and no particular objection is pointed out. There should have been.

But one ruling of the Court below is before us for review, and that is the overruling of the demurrer to the second paragraph of the answer.

That paragraph is good, if a part of the entire creditors of

a debtor may make a legal and binding composition with their debtor. That they can do so, is judicially settled. *For-sythe, supra*, p. 34, and cases cited. A single creditor, or any number of the creditors, of a debtor may compound with him, so it is not made a condition in the agreement for compounding that all the creditors shall come into the same arrangement. *Id.* See, on the general subject, *Kahn v. Greenherta*, 9 Ind. 430.

Nov. Term,
1861.

BROWN
v.
BROWN.

Per Curiam.—The judgment below is affirmed, with costs.

James Perry and John Yaryan, for the appellants.

W. A. Bickle, C. H. Burchenal, O. P. Morton and J. F. Kibbey, for the appellee.

BROWN v. BROWN and Another.

Judgment against *A.* and *B.* upon a promissory note. *B.* having established that he was a surety for *A.*, an order was entered that the execution to be issued on the judgment should first be levied of the property of *A.* The sheriff having levied the execution upon property of *A.*, took from him a delivery bond, with surety, which was afterward forfeited for a non-delivery of the property, and *A.* having no other property, the execution was then levied on the property of *B.*

Held, that the statute does not require the judgment plaintiff to pursue collateral remedies, before resorting to the property of the surety; and hence, the property of *B.* was subject to seizure.

APPEAL from the *Spencer* Common Pleas.

PERKINS, J.—Application for a restraining order. Application denied.

Friday,
December 13.

The case made is this: At the *January* term, 1858, *Samuel G. Brown* recovered a judgment against *Thomas M. Springsteen* and *Thomas H. Brown*, upon a promissory note, for a fraction over \$100. In *August* following, an execution issued on the judgment, and was levied upon personal property of *Springsteen*, who gave a bond, with one *Miller* as surety, for its delivery to the sheriff on the day named for

Nov. Term,
1861.

BROWN
v.
BROWN.

its sale. The delivery bond was forfeited, and the sheriff then levied upon property of the other defendant, *Brown*. After this, viz., in *January*, 1859, said defendant, *Brown*, on proceedings had for the purpose, in the Court where the judgment against him and *Springsteen* was rendered, obtained an entry of record that he was surety for *Springsteen* in the debt sought to be collected, and that the sheriff first exhaust the property of the latter, in attempting to make the money on the judgment.

It is not shown that *Springsteen*, the principal debtor, had any property that could be reached by execution; but it is shown that the delivery bond is an ample security for the debt, *Miller* being entirely good. It is thus manifest that the only question to be decided here is, was *Brown*, the plaintiff, bound to sue on the forfeited delivery bond, and suspend proceedings on the execution against the defendants *Springsteen* and *Brown*, for the obtaining of his money? In other words, the question is, which surety, the one in the judgment, or in the delivery bond, must pay the money?

As between the plaintiff and the defendants in the original judgment below, both of the defendants were original, principal debtors; and it was only by virtue of the provisions of the statute under which the defendant, *Brown*, procured himself to be declared a surety, that he was entitled to any favor from the sheriff in the collection of the judgment. *Kirby v. Studebaker*, 15 Ind. 45. But the statute goes no further than to direct the sheriff in his proceedings on executions in his hands. It does not require him, nor the plaintiff, to pursue collateral remedies.

On the merits, we do not see that security *Brown* has any equity over security *Miller*, but rather the reverse.

Per Curiam.—The judgment below is affirmed, with costs *David T. Laird*, for the appellant.

James C. Veatch, for the appellees.

CLUSTER v. GIBSON and Others.

Nov. Term,
1861.CLUSTER
v.
GIBSON.

In a suit for partition of lands, one of the defendants filed a cross-complaint, setting up a claim of exclusive ownership in the land by purchase from the common ancestor, and making all the other parties defendants.

Held, that the other heirs were made by the cross-complaint adverse parties, as to the matters alleged therein, and were not competent witnesses to disprove the allegations of said cross-complaint.

APPEAL from the *Grant* Common Pleas.

Friday,
December 13.

Per Curiam.—*Jacob Cluster*, the ancestor of the parties to this suit, was, in his lifetime, the owner of the land in controversy, and died intestate, leaving said parties his heirs.

Gibson and some of the other heirs filed a complaint in the *Grant* Court of Common Pleas against *Daniel Cluster*, *Peter Cluster*, and other heirs, for partition.

Daniel Cluster, the appellant, answered, claiming title to the premises in controversy. He alleged that he had bought, paid for, and taken possession of the land. The purchase was by parol. His answer was in the nature of a cross-complaint, asking a judgment for specific performance. His interest was adverse to all the other parties to the suit. As to him, they were all defendants. One of the other heirs, *Peter*, was admitted as a witness, and swore away the claim of *Daniel*.

Appellant's counsel says:

"There are irregularities in these proceedings that we have not noticed. The matters or points relied on by us are:

"1. That the plaintiff could not proceed against unknown defendants without annexing an affidavit. 2 R. S. 1852, § 40, p. 36."

"2. That *Peter Cluster's* testimony was improperly admitted. 2 R. S. 1852, § 238, p. 80.

"3. The admissions of the ancestor, *Jacob Cluster*, after his contract with *Daniel*, should not have been admitted in evidence. 9 Ind. 323, and authorities referred to.

"4. That the evidence sustains the appellant's claim to the land in controversy; that a judgment should be rendered accordingly.

"This cause was appealed to this Court from the judgment

Nov. Term, 1861. of partition, but the appeal was dismissed. The Court below then received the report of the commissioners, who reported that the land was not susceptible of partition. That report was confirmed, and the land ordered to be sold; from which order we have again appealed.

BAILEY.
V.
BOYLAN.

"We think that the judgment now rendered is the final judgment. R. S. 1852, §§ 18, 19, 20, p. 332; 11 Ind. 230."

On these points we merely remark, that there appears to have been an affidavit of non-residency, and as to the unknown heirs. As to proof of *Jacob Cluster's* admissions, see *Caldwell v. Williams*, 1 Ind. 405, in addition to citation of counsel, and *Tremper v. Barton*, 18 Ohio R. 418. On the weight of the evidence we say nothing, as we have concluded that the judgment should be reversed, on the ground of the admission of *Peter's* testimony, in order that the case may go back and be tried under the present law, on which trial *Peter* and *Daniel* will stand on an equal footing, both having a right to swear. Acts of 1861, Reg. Sess., pp. 51, 52.

The judgment is reversed, with costs. Cause remanded for further proceedings and trial.

J. Brownlee, for the appellant.

Isaac Van Devanter and *J. F. McDowell*, for the appellees.

BAILEY and Another v. BOYLAN and Others.

Friday,
December 13.

APPEAL from the *Putnam* Common Pleas.

Per Curiam.—Suit upon a note. Answer, setting up an assigned note as a set-off. The answer consisted of a number of paragraphs, some of which gave a copy of the note and the assignment. One made the note itself, with the assignment, a part of it, and some gave neither the note nor the assignment, nor a copy of either, as a part of them. Issues of fact seem to have been taken on most of these paragraphs, and tried, though the record is a little confused; but, in favor of

the ruling of the Court below, we must so presume. The assignment on the note, when produced, showed erasures, and parol evidence was heard to show when they were made, and thus to show what the real assignment was. This evidence was admissible under those issues where the answers had not specially set out the assignment, so as to fix its character. In such case, a failure to deny the assignment under oath does not admit the character of the assignment. See Ind. Dig., pp. 109, 189, 204, 284.

The judgment is affirmed, with 1 per cent. damages and costs.

John A. Matson and *J. A. Scott*, for the appellants.

T. J. Sample, for the appellees.

Nov. Term,
1861.

DALLAS
V.
SELLERS.

17 479
123 440

DALLAS v. SELLERS.

In an action for *crim. con.*, it is not competent for the defendant to prove facts going to show that there was no affection existing between the plaintiff and his wife, at and before the time of the alleged seduction.

APPEAL from the *Vermillion* Circuit Court.

Friday,
December 13.

PERKINS, J.—Suit for *crim. con.* Judgment for the plaintiff for seven hundred dollars.

Only two questions are made by appellant's counsel in this Court, and they are upon the rejection of evidence.

The defendant brought upon the stand a witness to state that "from what he had observed, and knew of the language and conduct of the plaintiff and his wife towards each other, there was not, in his opinion, any affection existing between them, at and before the time of the seduction."

Aside from the objection to the evidence as mere opinion, it would seem that evidence of facts, showing ground on which to found such an opinion, would have been inadmissible. If affection did not exist at the time, the defendant

Nov. Term, 1861. should not have interfered to cut off all chance for its growing in the future. *Van Vacter v. McKillip*, 7 Blackf. 578.

DUNN
v.
STANWOOD.

The defendant introduced upon the stand another witness, to state that, in his opinion, the plaintiff did not furnish his wife (that is his family) with a suitable house to live in. The Court refused to hear the evidence. There was no error in this. If any question could have arisen upon the quality of house the plaintiff lived in, the evidence should have been of facts, upon which the jury could have formed an opinion. It was not a question for experts.

Per Curiam.—The judgment below is affirmed, with 5 per cent. damages and costs.

John P. Usher and *D. W. Voorhees*, for the appellant.

J. E. McDonald and *A. L. Roache*, for the appellee.

DUNN v. STANWOOD.

Friday,
December 13.

APPEAL from the *Marion* Circuit Court.

DAVISON, J.—*Stanwood*, who was the plaintiff, sued *Dunn* for goods sold and delivered. With his complaint he filed an account, thus stated:

“*Thomas Dunn*, of *Indianapolis*, bought of *Jacob Stanwood*,
“1857, Nov. 19.—1 qr. pipe *Otard, Dupuy &*
 Co. Brandy, as per custom house certificate,
 No. 497, galls. 40½, at \$5.25, - - - - - \$212.63
“1858, Jan. 15.—1 qr. cask *Cushman's* Old
 Champaigne Brandy, 41, at \$4.50, - - - - - 184.50
“Cartage, - - - - - 88
\$398.01.”

Defendant answered: 1. By a general traverse; 2. Pay ment. Reply in denial of the second paragraph. Verdict for the plaintiff; upon which the Court, over a motion for a new trial, rendered judgment, &c.

The record contains a bill of exceptions which shows that

during the trial, the plaintiff produced the deposition of one *Elijah Powers*, who therein testified as follows: "I am acquainted with the parties. I know that *Stanwood* sold *Dunn* two quarter casks of brandy, at different times—one quarter cask was sold at \$4.50 per gallon, and the other at \$5.25 per gallon. I was in the city of *New York* where *Stanwood* carried on business, and purchased the brandy referred to for *Dunn*, at the request of my son, *John C. Powers*, who gave me a verbal order to purchase it for *Dunn*; and afterward he, *Dunn*, stated to me that he had received the brandy with the invoices direct from *Stanwood*. *Dunn* refused to pay me the bill for the brandy, stating that if he did so he would have to pay it over again to *Stanwood*, because he had received the brandy, with the invoices, from him and in his name. When this occurred, myself and *John C. Powers* were carrying on the wholesale liquor business at *Indianapolis*, under the name of *Powers & Co.* At the time of the above refusal we had been selling *Dunn* goods, and presented our bill, embracing therein the two quarter casks of brandy, because *Stanwood* expected us to collect the amount due for the brandy as his agents, but *Dunn* refused payment, as above stated." Plaintiff also produced the deposition of said *John C. Powers*, in which he testified, substantially, to the same facts stated in the former deposition.

Defendant then proved by one *William La Rue*, a witness, that he was present at a settlement which took place between *Dunn* and *Powers & Co.*; that a bill was presented by them, and was before the parties to that settlement; that the whole amount of that bill was then settled, and left the defendant creditor to *Powers & Co.* about three dollars. At this stage of his testimony, a paper was shown to the witness, which he recognized as the paper before the parties to the settlement at the time it was made—especially he recognized the paper by the figures on its back; but he did not read the paper, and does not know the contents of it, other than what he heard from the parties at the time. Heard no mention made of brandy. Witness stated that the paper was in the handwriting of *John C. Powers*. The defendant then offered the paper in evidence, and also

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1861.

DUNN
v.
STANWOOD.

Nov. Term, 1861. offered to prove by the witness, statements made at the time of the settlement by *Dunn, Elijah Powers* and *John C. Powers*, to the effect that every item in the bill recognized by the witness was then settled, in that settlement. But the Court refused these offers, and the defendant excepted.

DUNN
v.
STANWOOD.

The paper offered in evidence is set out in the bill of exceptions, and contains two items of account which are, in appearance, similar to those stated in the account sued for in this action. The refusal of the Court to admit the offered evidence involves the only question in the case. As we understand the testimony to which we have referred, *Elijah* and *John C. Powers* were agents of the plaintiff, authorized to collect his demand against the defendant. Assuming that to be the case, a payment of it to them would, of course, bar the action, and the result is, the proposed evidence, if it tended to prove that that demand had been so paid or satisfied, should have been admitted.

The paper offered in evidence is, it seems to us, sufficiently identified as having been presented to the defendant, and the proof is ample that its contents were before the parties to the settlement when it took place. If then the paper contains the items of account now sued for, evidence that the parties, while settling, admitted that every item in the paper was then settled, would be legitimate; because, in the event that the *Powers* were found to be the plaintiff's agents, such evidence, in the absence of contrary proof, would be conclusive against him. The offered evidence was doubtless proper for the consideration of the jury. What influence it should have, when considered in reference to other evidence in conflict with it, is a question for their determination. In our opinion, the exception to the ruling of the Court was well taken.

Per Curiam.—The judgment is reversed, with costs. Cause remanded, &c.

T. D. & R. L. Walpole, for the appellant.

John Coburn, for the appellee.

Nov. Term,
1861.

WALKER v. DUNHAM, SECRETARY OF STATE.

WALKER
v.
DUNHAM.

The act of *March*, 1859, fixing the time and mode of electing a State printer, &c., (Acts 1859, p. 143,) was intended to fix the prices to be paid for the public printing thereafter to be done, whether by the State printer then in office, or by those to be elected under the provisions of that act; and the title of the act was sufficient to authorize such legislation under it.

The act is not obnoxious to the objection that it contains more than one subject, and matters properly connected therewith, as the Legislature may well, in one act, define the duties and fix the compensation of an officer, and provide for the future filling of the office.

The State printer is an officer, and the compensation and duties of an officer may be increased or diminished, in the absence of constitutional restrictions, at the pleasure of the Legislature.

17	488
129	807
17	488
137	561
17	488
142	186
17	488
152	16
17	488
157	456
17	488
161	223
17	488
166	196

APPEAL from the *Marion* Circuit Court.

Friday,
December 13.

WORDEN, J.—In *January*, 1859, *Walker* was duly elected State printer, gave bond, and entered upon the duties pertaining to the office.

Afterward, in *March*, 1859, the Legislature passed an act entitled "An act fixing the time and mode of electing State printer, defining his duties, fixing compensation, and repealing all laws coming in conflict with this act." Acts 1859, p. 143. By this act, the prices to be paid the public printer for printing are reduced below those established by the law in force at the time *Walker* was elected and gave bond.

The question presented by this record is, whether *Walker* is entitled to be paid for printing done after the act of *March*, 1859, took effect, according to the law in force at the time of his election, or whether the price is to be regulated by the act of 1859. The Court below held that the act of 1859 governs in this respect.

There can be no mistake as to the intention of the Legislature in this respect. The second section of the act in question provides, that "The prices to be paid the public printer, *from and after the taking effect of this act*, are hereby established as follows," &c. An emergency was declared, and the act took effect from its passage. It is clear, from the terms of the act, that the Legislature intended to fix the prices to be paid the printer then in office, for work done thereafter,

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as well as the prices to be paid any future public printer. Looking to the language of the act, it can not be held prospective merely, in that sense that would apply it to a future, and not to the then present, public printer. It is prospective, undoubtedly, in reference to the printing. It fixes the prices to be paid for printing thereafter to be done, by whomsoever the work may be performed. Two points, however, are made that require careful consideration.

First. That the title of the act is not sufficient to admit legislation under it, fixing the prices to be paid the public printer then in office.

Second. That the Legislature could not, as to the appellant, diminish the prices as established by law at the time he took the office, and gave bond; as that would be a violation of the contract entered into between him and the State.

We have seen that the title is, "An act fixing the time and mode of electing State printer, defining his duties, fixing compensation, and repealing all laws coming in conflict with this act."

It is claimed that this title is not sufficient to authorize legislation in reference to the then incumbent of the office because its terms apply only to the person to be elected under the provisions of that act; in other words, that the title purports only to define the duties and fix the compensation of State printers to be elected as provided for in the act. We do not, however, so read the title. The office of State printer was one known to the law at the time, and we think the pronoun "his," as used in the title, embraces that officer generally, whether then in office, or to be thereafter elected. With this reading of the title, it is large enough to embrace legislation fixing the compensation and defining the duties, as well of the present, as of future State printers. Nor is the act obnoxious to the objection that it contains more than one subject, and matters properly connected therewith. The Legislature may well, in one act, define the duties and fix the compensation of an officer, and provide for the future filling of the office.

The second point we think, also, is not well taken. The State printer is an officer. *Ellis v. The State*, 4 Ind. 1.

The compensation and duties of an officer may be increased or diminished, in the absence of constitutional restrictions, at the will of the Legislature. *Gilbert v. The Board of Commissioners, &c.*, 8 Blackf. 81. But it is insisted that the State printer is in a position different from that of an officer merely; that he stands in the light of a contractor, being required to enter into a bond conditioned for "the prompt, accurate and workmanlike execution of the public printing, and the faithful performance of all the duties required of him by law." That while he is thus bound for the execution of the public printing, the State is also bound to him for the prices fixed by law at the time his bond is given. A fair test of this question would be to ascertain whether or not he could resign the office, and thereby discharge himself from the obligation of his bond. If he could do so, it shows that his position is that of an officer merely. There can be no doubt but that a resignation of the office, the bond not being broken during his continuance therein, would discharge him, like any other officer, from liability.

Per Curiam.—The judgment below is affirmed, with costs.

S. Major, J. E. McDonald and A. L. Roache, for the appellant.

C. L. Dunham, for the appellee.

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1861.

HART
v.
BOWSER.

HART and Another v. BOWSER and Another.

APPEAL from the *Adams Common Pleas*.

Per Curiam.—Action by *Bowser and Story* against the appellants, to foreclose a mortgage. Judgment for the plaintiffs. The appellants have assigned several errors, but in looking through the record we find no exception, whatever, taken to any ruling of the Court below. There is no question presented for our decision.

Friday,
December 13.

The judgment is affirmed, with costs.

L. M. Ninde and H. W. Puckett, for the appellants.

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HAZELRIGG v. YARYAN and Another.

LONG
v.
FELKNER.

Friday,
December 13.

APPEAL from the *Union* Common Pleas.

Per Curiam.—Action by the appellees against the appellant upon a promissory note. Judgment for the plaintiff. The case is before us on the evidence, from an examination of which we find no cause to disturb the finding and judgment.

The judgment below is affirmed, with 5 per cent. damages and costs.

T. W. Bennett and *Nelson Trusler*, for the appellant.

John Yaryan, for the appellees.

LONG v. FELKNER.

Friday,
December 13.

APPEAL from the *Kosciusko* Circuit Court.

Per Curiam.—The appellee, who was the plaintiff, sued *Long* upon a promissory note, executed to one *John W. Egbert*, who assigned it, by indorsement, to the plaintiff.

The note is in this form:

"\$717.71.

"MILFORD, *April* 17, 1858.

"Fourteen months after date, I promise to pay to the order of *J. W. Egbert*, seventeen hundred and seventeen dollars, and seventy-one cents, value received, without any relief from appraisement laws, *in current bank paper*.

(Signed) "JOEL LONG."

Defendant answered by four paragraphs. To the third a demurrer was sustained, but as no exception appears to have been taken, the ruling on the demurrer is not properly before us. The issues were submitted to the Court, who found for the plaintiff, \$723, the full amount of the note and interest; and thereupon, the defendant moved for a new trial upon two grounds. 1. The finding of the Court was unsustainable

by the evidence. 2. The damages assessed are excessive. There is a bill of exceptions which shows that the note in suit, with its indorsement, was given in evidence; but the record contains no sufficient averment, as required by rule 30 of this Court, that "this was all the evidence given in the cause." Ind. Dig., p. 722. The result is, the causes assigned for a new trial are not examinable in this Court.

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KNOWLTON
v.
MURDOCK.

The judgment is affirmed, with 3 per cent. damages and costs.

KNOWLTON and Another v. MURDOCK.

A judgment can not be reversed for error committed in sustaining or overruling a demurrer for misjoinder of causes of action.

Where there has been a trial without an issue, in the Court below, the defect must be brought to the attention of that Court, before it can be noticed in the Supreme Court.

APPEAL from the *Cass* Circuit Court.

Friday,
December 13.

Per Curiam.—Suit by *Murdock* against the appellants, counting, *first*, upon a special contract; *second*, for goods bargained and sold; and, *third*, for goods sold and delivered. Judgment for the plaintiff.

The appellants assign three errors: 1. The overruling of a demurrer to the complaint. 2. That there was a trial without an issue. 3. The refusal of the Court to grant a new trial.

Two causes of demurrer were assigned: *first*, that the complaint did not state facts sufficient, &c.; and, *second*, misjoinder of causes of action.

The complaint evidently states facts sufficient; indeed, no defect in this respect is pointed out in the brief of counsel. As to the supposed misjoinder, if any error was committed in this respect, the judgment can not, for that cause, be reversed. Code, § 52.

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HOAGLAND
v.
THE STATE.

As to the second error assigned, we may remark that the record is somewhat confused as to the issues. A bill of exceptions taken by the appellants states, that upon the trial of the cause, *after the issues herein had been completed*, &c., the plaintiff offered certain evidence.

Whatever may have been the state of the issues, no advantage was sought to be taken of the alleged defect in the Court below; and it has been several times decided, that such objection can not be successfully made, for the first time, in this Court.

There were no written reasons filed for a new trial, or if filed, they are not in the record.

The judgment is affirmed, with 2 per cent. damages and costs.

E. Walker, for the appellants.

L. Chamberlin, for the appellee.

HOAGLAND v. THE STATE.

Section 90 of the act to revise the rules and practice in criminal cases, (2. R. S. 1852, p. 372,) which provides that "all persons who are competent to testify in civil actions," shall also be competent witnesses in criminal cases, was intended to adopt the law *as it then stood*, upon the subject of the competency of witnesses in civil actions; and hence the law of 1861, (Acts 1861, p. 51,) admitting parties to testify in civil actions, does not apply to criminal cases.

Friday,
December 13.

APPEAL from the *Harrison* Circuit Court.

WORDEN, J.—Indictment against the appellant for a rape. Trial, and conviction. On the trial, the defendant offered himself as a witness, but the State objecting, he was rejected. This ruling presents the only question arising in the case.

The trial was had after the act of *March 11*, 1861, (Acts 1861, p. 51,) took effect. That act repeals § 238 of the code,

and enacts, among other things, that "every free white person of competent age, shall be a competent witness in any civil cause or proceeding, and no person shall be disqualified as a witness by reason of interest in the event of that, or any other suit, or because such person is a party in said action or proceeding. Any person, a party in the action, may testify in his own behalf, or in behalf of any other party or parties therein, and any one person or party in a suit, may compel any other person or party therein to testify, under the same rules and regulations as other witnesses may be compelled, and the interest in the suit of any witness shall be regarded only as to his credibility, and shall not affect his or her competency."

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THE STATE.

This act, in itself, has no reference to the competency of witnesses in *criminal* cases. Its terms limit its application to *civil* causes. But the act on the subject of practice, &c., in criminal actions, contains the following provision: "The following persons are competent witnesses: *First*. All persons who are competent to testify in civil actions. *Second*. The party injured by the offense committed. *Third*. Accessories, when they consent to testify." 2 R. S. 1852, § 90, p. 372.

It is insisted, that inasmuch as by the act of 1852 all persons who are competent to testify in a civil action, are made competent witnesses in criminal actions, and as by the act of 1861 parties are competent witnesses in civil causes, it follows that they are competent to testify in a criminal cause.

The solution of this question depends upon the construction which shall be given to the provision of the act of 1852, making "all persons who are competent to testify in civil actions," competent witnesses in criminal causes.

Was this provision intended to adopt the law *as it then stood*, upon the subject of the competency of witnesses in civil actions, or was it intended to adopt such law with all the changes that might thereafter be made in respect to such competency? We are inclined to the opinion that the former, only, was intended. The language employed does not well admit of any other interpretation. The words, "who are

Nov. Term, 1861. competent," imply present time, as effectually as if the words "who are *now* competent" had been employed. The phrase has reference of course to the time when the act took effect, for from that time, only, a statute ordinarily speaks. In order to give the provision the construction contended for, and make it embrace such changes as might afterward be adopted in the law respecting the competency of witnesses in civil actions, some interpolation, or change of phraseology, would be necessary. Such interpretation would require that the provision should read somewhat as follows: "All persons who are," or *who may be hereafter rendered*, "competent to testify in civil actions, &c."

BISH
v.
BRADFORD.

We are referred by counsel for the appellant, for analogies, to decisions of the Supreme Court of the *United States*, upon the acts of Congress adopting the State laws on the subject of process, &c. The most of these cases are examined in the case of *Simpson v. Niles*, 1 Ind. 196. Nothing is perceived in these cases that is at variance with the conclusion here arrived at.

Upon the adoption of the code, parties were not competent witnesses for themselves, either in civil or criminal actions, except, perhaps, where examined by the adverse party.

The act of 1861 not changing the law as to competency of parties in criminal actions, it follows that the appellant was not competent, and that the ruling was correct.

Per Curiam.—The judgment is affirmed, with costs.

W. T. Oitq and *S. H. Kerr*, for the appellant.

A. B. Carlton and *R. M. Weir*, for the State.

BISH v. BRADFORD.

Proceedings in aid of execution against a railroad company. *A.*, who was alleged to be indebted to the company on a subscription of stock, was made a defendant to answer as to such indebtedness, and appeared and answered that his said subscription was procured by false and fraudulent representations, on the part of the agents of said company, in this, to wit: that

said agents represented that the company had already sufficient stock subscribed to complete said road within eighteen months, and only desired subscriptions from the defendant, and others along the line of said road, as an evidence of their friendly disposition to the road; that defendant, relying on the truth of said representations, and believing the same to be true, and that said road would soon be completed, and the value of his land be thereby largely increased, made said subscription; that, in fact, said company had not sufficient means to procure and clear the track for said road, and that said road had been abandoned, &c.

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BISH
v.
BRADFORD.

Held, that the facts stated in the answer were not sufficient to release the defendant from liability on his subscription, the alleged misrepresentations being of matters of mere opinion and expectation, and not of any existing fact.

Held, also, that the consideration of the subscription was the shares of stock to which the subscriber became entitled, and not those incidental advantages which he might have anticipated from a completion of the road.

Held, also, that the fact that the road had been abandoned, furnished no defense, as the creditors of a corporation have a right to pursue its stockholders, even after its corporate existence has ceased.

APPEAL from the *Grant* Circuit Court.

Friday,
December 13.

WORDEN, J.—This was a proceeding by *Bish* against *Bradford* and the *Cincinnati & Chicago Railroad Co.*, under the statute regulating proceedings supplementary to execution. The complaint alleges a recovery by the plaintiff of a judgment against the railroad company; the issuing of an execution thereon, and the return of no property, &c.; that the defendant, *Bradford*, is indebted to the company in the sum of fifty dollars, and the interest thereon, on a subscription made by him to the capital stock of the *Cincinnati, New Castle & Michigan Railroad Co.*, which company consolidated with the *Cincinnati, Cambridge & Chicago Short Line Railroad Co.*, thereby constituting the *Cincinnati & Chicago Railroad Co.*, which last named company afterward consolidated with the *Cincinnati, Logansport & Chicago Railway Co.*, thereby constituting the company first above named. A copy of the subscription is set out.

The railroad company was defaulted. *Bradford* answered in six paragraphs. A demurrer was sustained as to all except the fifth, to which a demurrer was overruled, and the plaintiff excepted. Replication, trial, verdict and judgment for the defendant.

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v.
BRADFORD.

The ruling on the demurrer to the fifth paragraph of the answer presents the first question in the record, and the decision of that disposes of the whole case. That paragraph is as follows:

"5. Said defendant further answers and says, that it is true that this defendant subscribed to the capital stock of the *Cincinnati, New Castle & Michigan Railroad Co.*, for one share, of fifty dollars, but the defendant avers that the same was obtained through the fraud, deceit and misrepresentation of said company, through her agents, as hereinafter mentioned. This defendant avers that at the time and before the subscription was made, and for the purpose of inducing this defendant to make the same, the agent of said company falsely, fraudulently and deceitfully represented to him, that said company had sufficient means to build their contemplated road from *New Castle*, *Henry* county, *Indiana*, to *Marion*, and from thence to the town of *Wabash*, and so north to *Grand* river, in the State of *Michigan*; that said company did not need a dollar from the citizens along the line of said railroad; that said road would be completed to *Marion*, and the cars be running, within eighteen months; that within that time all the real estate on or near the line of said road, would be greatly augmented in value; that the said company, having all the means necessary for completing said road, did not need to call upon the people on or near the line of said road for subscriptions to her capital stock, for the purpose of assisting in building the road, because they had sufficient means for that purpose, but that in view of the great amount of capital which the company would invest and expend on the line of the road, they desired that the citizens along and near the line of the road should subscribe a sufficient amount to her stock to show that they were friendly to the enterprise, and to satisfy the company of the good will of the people, that there might be an assurance that the vast capital thus invested would be secure. This defendant also says that he was the owner of a farm near the town of *Marion*, at the time of making said subscription, and believed that it would be proper for him to make said subscription, on account of said inducement.

and representations and promises, and believing the same to be true, and that said agents were truthful and reliable, they being the agents of the company for soliciting subscriptions to her capital stock. This defendant says that he knew that if said representations were true, that said road would be very certain to be built in a short time and would be a great advantage to him, by augmenting the value of his farm, and furnishing a home market for his surplus produce; which representations defendant avers were the sole inducement for said subscription. This defendant avers, that believing and relying upon said several representations of said agents, he was induced by the same to make said subscription. Defendant avers that said representations were false and fraudulent, and coming from men who were *noted as preachers of the Gospel*, (as defendant alleges said agents were,) they were well calculated to deceive and mislead the defendant; which he avers they did, and that said agents made the same for that purpose, knowing the same to be false. This defendant avers the truth to be, that said *Cincinnati, Newcastle & Michigan Railroad Co.* had not the means even to procure, clear and grub the track of said road. That said road is not completed, but, on the contrary, all idea of prosecuting said work, and completing the same, has long since been abandoned by said *Cincinnati & Chicago Railroad Co.*, without defendant's consent."

We are of opinion that this paragraph is insufficient; that the facts charged do not release the defendant from liability on his subscription.

The false representations charged to have been made may be divided into two classes: *First.* Those relating to the means of the company, and her ability to complete the road. *Second.* Those that relate to the time within which the road would be completed, and the effect such completion would have on the property of the country.

The first class are insufficient, because they are but mere expressions of opinion upon an existing fact, and its connection with a future event. It will be observed that no particular amount of means were represented to have been possessed by the company. The substance of the statements

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Nov. Term, 1861. *BISH v. BRADFORD.* in this respect was, that the company had sufficient means to build the road, without obtaining subscriptions along the line of the road. This could have been nothing but matter of opinion. How much it would cost to build the road, or whether the means would hold out, depended upon events which, probably, neither the corporation nor the defendant could foresee. In *Hardy v. Merriweather*, 14 Ind. 203, it was held, that representations that the company had stock enough to complete the road, and would do it in two years, were too vague, and manifestly nothing more than expressions of opinion. That case is decisive of the present, in this particular.

The second class of representations relate to the future. They relate to no existing fact, and are so clearly matters of opinion and speculation, that nothing further need be said upon them. The entire consideration of the defendant's subscription was the share of stock for which he subscribed. *The New Albany & Salem Railroad Co. v. Fields*, 10 Ind. 187. Now he can not say, that because the road has not been built, and therefore that his property has not been enhanced in value, an incidental benefit that he expected to obtain, the consideration of his subscription has failed.

The fact that the construction of the road has been abandoned, furnishes no defense. Creditors have a right to pursue stockholders of a corporation, even after its corporate existence has ceased. *Hardy v. Merriweather, supra.*

The demurrer should have been sustained.

Per Curiam.—The judgment is reversed, with costs. Cause remanded, &c.

A. Steele, H. D. Thompson and J. Brownlee, for the appellant.

Isaac Van Devanter, J. F. McDowell and H. S. Kelley, for the appellee.

KREIGH v. THE STATE.

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1861.

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v.	144	221
ROSS.		

An information for a felony, in the Court of Common Pleas, must show that the defendant is in custody on a charge of the felony for which the information is filed, and must negative the finding of an indictment against him.

APPEAL from the *Lagrange* Common Pleas.

Friday,
December 13.

Per Curiam.—Information against the defendant, the appellant here, for a rape. Trial; conviction and judgment.

The information is radically defective, in not showing that the Court below had jurisdiction of the offense.

It alleges that the defendant was in custody, but does not show that he was in custody on a charge of the felony for which the information was filed, nor does it negative the finding of an indictment against him. The case is settled by that of *Justice v. The State*, ante, p. 56.

The judgment is reversed, and the cause remanded. The clerk will give the proper notice for the return of the prisoner to *Lagrange* county.

A: *Ellison*, for the appellant.

J. W. *Cummings*, for the State.

PRATHER and Another v. ROSS.

Suit upon a promissory note. Answer: that at and before the assignment of the note to the plaintiff, the payee thereof, one *G. W.*, was indebted to the defendant in the sum of \$850, by a written contract executed by him, as follows, viz., "I, *G. W.*, Land Agent of the *Ohio and Mississippi Railroad Co.*, agree to pay to *A.* six hundred dollars for waste grounds, which cover some eight town lots on the south side of the railroad; also, two hundred and fifty dollars for waste grounds and wood yard on the north side of the road. Witness my hand and seal." (Signed) "*G. W.*, Land Agent." [SEAL.]
Reply: 1. Want of consideration. 2. That the indebtedness pleaded as a set-off is the indebtedness of the railroad company, a corporation

17b	495
155	585

17	495
Case 2	
180	03255

17	495
Case 2	
160	130

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authorized to make such contracts; that the consideration thereof moved to said company, and not to the said *G. W.*, who was only the agent of said company, and, as such, had power to make such contracts, and was in the habit of signing said contracts in the form aforesaid; all of which was well known to the defendant. On the trial, the plaintiff produced a witness who testified that the consideration of said last named contract was that the defendant should convey to the company, in fee simple, the premises therein described, and that no such conveyance had been made.

Held, that the evidence introduced to show that the defendant had not kept his part of the written contract pleaded by him, by conveying the land to the company, was improperly admitted, there being no reply setting up the facts constituting the alleged failure.

Held, also, that it was competent for the defendant to prove, by a witness shown to be a resident of the neighborhood, and to be acquainted with the technical terms used in the construction of railroads, that the terms, "waste ground," meant earth or other material excavated from the bed of the road, and deposited on the ground adjoining.

Held, also, that where a question of construction of a writing arises from the obscurity of the writing itself, it must be determined by the Court, alone; but questions of usage, custom, and actual intention and meaning derived therefrom, are for the jury.

Held, also, that in order to bind the principal, and make it his contract, the instrument must purport on its face to be the contract of the principal, and his name must be inserted therein, and signed thereto, and not merely the name of the agent, even though the latter be described as agent; and hence, the contract pleaded as a set-off was not the contract of the railroad company, but the individual contract of the plaintiff.

Friday,
December 13.

APPEAL from the *Jennings* Circuit Court.

DAVISON, J.—This was an action by *Ross*, who was the plaintiff, against *Prather* and *Tripp*, upon a promissory note for the payment of \$950. The note was given by the defendants to one *George W. Cochran*, who assigned it to the plaintiff. Defendants answered by two paragraphs: 1. *Prather* is the principal debtor, and *Tripp* executed the note as surety; that before it was assigned by *Cochran*, and before the defendants had notice of such assignment, he, *Cochran*, was indebted to *Prather* \$850, by a written contract, in these words:

"VERNON, October 15, 1853.

"I, *G. W. Cochran*, Land Agent of the *Ohio & Mississippi Railroad Co.*, agree to pay *H. Tripp*, six hundred

dollars for waste grounds, which cover some eight town lots on the south side of the railroad; also, two hundred and fifty dollars for waste grounds and wood yard, (graded,) on the north side of the road, making a total of \$850.

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v.
ROSS.

"Witness my hand and seal.

(Signed) "G. W. COCHRAN, [SEAL.]
Land Agent."

This contract is indorsed thus:

"SCRIPTON, *October 18, 1856.*

"For value received, I assign the within to *Hiram Prather.*
(Signed) "HAGERMAN TRIPP."

And defendants aver that *Cochran* is thus indebted to *Prather*, \$850, which they offer to set-off, &c.

2. The second paragraph is also a defense of set-off, and is similar in its averments, except as to the contract which it sets up, which is as follows:

"VERNON, *October 13, 1852.*

"I, *Geo. W. Cochran*, Land Agent of the *Ohio & Mississippi Railroad Co.*, hereby agree to pay *Hagerman Tripp*, the owner of the s. w. quarter of sec. 34, town. 7, north of range 8 east, in *Jennings* county, *Indiana*, \$500, for right of way through the same for said railroad. This contract covers 80 feet in width; 40 feet on each side of the track. It is hereby agreed that said company shall not build or construct on said grounds any building, except car houses, depot and water station.

"Witness my hand and seal.

(Signed) "G. W. COCHRAN, [SEAL.]
Land Agent."

Upon this contract there is the following assignment:

"SCRIPTON, *October 18, 1856.*

"For value received, I assign the within to *Hiram Prather.*
(Signed) "HAGERMAN TRIPP."

To these defenses the plaintiff filed a general denial, and six special replies. To the second, fourth, sixth and seventh, demurrers were sustained. The third alleges, that

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the defendants had notice of the indorsement of the note to the plaintiff, before, or at the time of, the assignment of the contracts to *Prather*. And the fifth avers, that for the promises set forth in the contracts there was no consideration. The issues were submitted to a jury, who found specially, "That *Prather*, at the time the contracts were assigned to him by *Tripp*, had no notice of the indorsement of the note to the plaintiff." They also found a general verdict in favor of the plaintiff for \$1,085; and the Court having refused a new trial, rendered judgment, &c.

Upon the trial, the note with its indorsement, and also the contracts with their assignments, having been given in evidence, the plaintiff produced *George W. Cochran*, who testified that he executed the contracts set up in the answers as the agent of the railroad company; and that the consideration of each contract was, that *Tripp* was to release, or convey to the company, in fee simple, the premises therein respectively described; but that no such release or conveyance had been made. The admission of this evidence was resisted, on the ground "That there was no issue to which such evidence was applicable." But the Court admitted the evidence, and the defendants excepted.

This exception, it seems to us, was well taken. If the defendant, *Tripp*, in breach of his contract, failed to release or convey to the railroad company the premises described, &c., the facts constituting such failure should have been specially set up in a reply to the answers, in order to apprise the defendants of what they would be required, upon the trial, to repel by proofs. *Van Santvoord's Pl. 408*. But the record before us contains no such pleading, and, in its absence, no evidence tending to prove his failure so to release and convey was admissible. It is therefore obvious, that upon the ground assumed by the defendants, the evidence, in this instance, should have been rejected.

The plaintiff having closed his testimony, the defendants offered to prove by one *William D. Evans*, a witness, that he resided in the neighborhood of the lands described in the contracts; that he is acquainted with the technical terms used in the construction of railroads, and that the terms,

"waste ground," when used in railroad building, meant "earth or other material excavated from the bed of the road, and deposited on the ground adjoining. But the Court refused to admit the offered evidence, and the defendants noted an exception.

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As has been seen, the contract pleaded as a set-off in the first paragraph of the answer, was for the payment to *Tripp* of six hundred dollars for "waste ground, which covers some eight town lots on the south side of the railroad; also, two hundred and fifty dollars for *waste ground* and wood yard, (graded,) on the north side of the road." Now, as there is nothing in the language of this contract necessarily involving the idea of a conveyance in fee simple, it was sought by the proposed evidence so to explain the terms in question, as to make the contract a mere settlement of the damages occasioned by depositing "earth or other material" on *Tripp's* lots, "and, perhaps, a license to use the wood yard as long as the railroad company might desire to use it."

For the purpose intended, the offered evidence may, or may not, have been effective, still it should, in our judgment, have been given to the jury for their consideration. Ordinarily, "the meaning of words, and the grammatical construction of the English language, so far as they are established by the rules and usages of the language, are *prima facie* matter of law to be construed and passed upon by the court. But language may be ambiguous, and used in different senses, or general words in particular trades and branches of business may be used in a new, peculiar or technical sense, and therefore, in some instances, evidence may be received from those who are conversant with such branch of business, and such technical or peculiar use of language, to explain and illustrate it." *Brown v. Brown*, 8 Met. 576. "If the question arises from the obscurity of the writing itself, it is determined by the court alone; but questions of custom, usage, and actual intention and meaning derived therefrom, are for the jury." 2 Phil. Ev., § 280. These expositions at once show that the proposed evidence was admissible, because, as we understand it, the witness was conversant "with the technical terms used in the construction of

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railroads," and also with the peculiar meaning of the phrase, "waste ground," when "used in railroad building." Hence it was for the jury, and not the Court, to determine the sense in which that phrase was used by the contracting parties.

The appellee, however, has assigned a cross error, to the effect "that the Court erred in sustaining the demurrers to the second, fourth, and seventh paragraphs of the reply; but as in his brief he relies alone upon the validity of the second paragraph, that alone will be noticed. It reads as follows: "And for second reply, &c., the plaintiff says that the indebtedness set up as an off set is the indebtedness of the *Ohio & Mississippi Railroad Co.*, which is a corporation, duly authorized to make the contracts set forth in the answer, the consideration for which moved to her, and not to the said *Cochran*. That *Cochran* was the legally appointed agent of the company, and had full power to contract for, and bind her in the matters of said contracts; that he was in the practice of signing contracts on behalf of the company in the form and manner as these contracts are signed, and they were always and uniformly recognized by the company as binding on her; all which, &c., was well known to the defendants," &c.

The contracts upon which the answer is based commence in this form: "I, *G. W. Cochran*, Land Agent of the *Ohio & Mississippi Railroad Co.*, agree to pay," &c. And conclude thus: "Witness my hand and seal. *G. W. Cochran*, [SEAL.] Land Agent."

The appellee argues that by the contracts the railroad company is alone bound for payment, while on the other hand it is insisted that they are the contracts of "*George W Cochran*." The usual rule in cases of this sort is, "that in order to bind the principal, and make it his contract, the instrument must purport, on its face, to be the contract of the principal, and his name must be inserted in it, and signed to it, and not merely the name of the agent, even though the latter be described as agent, in the instrument. Story on Agency, § 147. Tested by this rule, the instruments in question can not be held the contracts of the company, because she does not agree or promise to pay the several amounts

therein stipulated to be paid, nor is her name signed to either contract; and the result is, *Cochran*, who, though he describes himself as agent, really does agree to pay, having signed the instruments by his own name, is individually liable on the contracts. There are, it is true, several adjudicated cases apparently in conflict with the rule to which we have referred, but in this Court it has been uniformly adhered to, and we are inclined to follow it. *McClure v. Bennett*, 1 Blackf. 189; *Deming v. Bullitt*, *id.* 241; *Pitman v. Kinter*, 5 Blackf. 250; *Mears v. Graham*, 8 *id.* 144; *Crum et al. v. Boyd*, 9 Ind. 289.

We are of opinion that the Court, in sustaining the demurrer, committed no error. But the appellee makes another point. He says that the note in suit being joint, it was not competent to show that "*Tripp*" was only surety. Evidence to that effect was given in the lower Court without objection. In that Court, the point now made was not raised, and it is therefore not properly before us.

Per Curiam.—The judgment is reversed, with costs. Cause remanded, &c.

H. C. Newcomb and *J. Tarkington*, for the appellants.

A. C. Downey and *L. Bingham*, for the appellee.

HOWE v. MCBRIDE.

APPEAL from the *Kosciusko* Circuit Court.

Saturday,
December 14.

PERKINS, J.—*Howe* gave *McBride* a note and mortgage. When they became due, *Howe* failed to pay and *McBride* proceeded to foreclose. Due notice of the foreclosure suit was served upon *Howe*, but he failed to attend Court to see that the proceedings were correct, and the proper judgment rendered. He let judgment go by default. The judgment was, to make the money by sale of the property mortgaged, as far as it would go, and to collect the balance of the goods and chattels, &c. of the defendant.

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BRANHAM
v.
COSSETT.

Howe thinks the latter part of the judgment is wrong, not because unauthorized by the note and mortgage, but because the mortgage should have contained a stipulation that there should be no remedy beyond the sale of the property. He says there was a mistake in the mortgage, but that he never suspected it till he learned of this judgment *in personam* against him; and he applied after the term to have it set aside. Now, it may be asked of Mr. *Howe*, he may ask himself the question, why was Mr. *McBride* required to go into Court and give Mr. *Howe* notice to meet him there to examine this matter, before he could proceed to enforce collection of his note and mortgage by sale? It was for the very purpose of giving Mr. *Howe* an opportunity to see if there was any mistake, and if so, to have it corrected. The Court is not bound to give him another opportunity, since he voluntarily disregarded that furnished him at the proper time. There is no case made of excusable negligence.

Per Curiam.—The judgment is affirmed, with costs.

J. S. Frazer, for the appellant.

BRANHAM v. COSSETT.

Suit by *A.* against *B.*, the mortgagor, and *C.*, the owner of the equity of redemption, to foreclose a mortgage. *C.* answered that *A.* had purchased the land of a railroad company and conveyed it to *B.*; that the title of the company came to be disputed, and that it was agreed by *A.*, in consideration that *C.* would purchase the mortgaged premises, and assume the payment of the mortgage, that he, *A.*, would procure from the grantor of the railroad company a conveyance to *C.*, to cure said supposed defect in the title, and that the time of payment of the mortgage should be extended until such conveyance was obtained; that *A.* had never procured said deed, &c.

Held, that the answer presented a good defense to the action.

Saturday,
December 14.

APPEAL from the *Jennings* Circuit Court.

PERKINS J.—Suit to foreclose a mortgage; judgment for plaintiff. It appears that on *April 1, 1859, Harrison Sloop*

mortgaged a tract of land to *Pearl S. Cossett*, to secure the payment of a sum of money. Afterward, *William H. Branham* purchased of *Sloop* his equity of redemption. *Cossett* now files his complaint for foreclosure, making *Sloop* and *Branham* defendants. *Sloop* makes default. *Branham* makes this defense, viz., he answers to the complaint that *Cossett* purchased the land of the *Fort Wayne and Southern Railroad Company*, whose title came to be disputed, whereby the land would be unsaleable, and might fail to bring the amount due on *Cossett's* mortgage. And that, subsequently, it was agreed between the plaintiff, *Cossett*, and the defendants, *Sloop* and *Branham*, that in consideration that *Branham* would purchase said real estate, and assume the payment of said mortgage, *Cossett* would procure the execution of a quit claim deed of said real estate from one *Schryer*, to *Branham*, *Schryer* being the prior owner, and grantor of the railroad company, and would extend the time of payment of said mortgage from *Sloop*, and delay its foreclosure, till said quit claim deed was obtained from *Schryer* and delivered to *Branham*; whereupon, in consideration of said promises, *Branham* purchased the equity of redemption of *Sloop*, and received a deed subject to said mortgage; and has been at all times, and still is, ready, &c. to perform on his part; but said *Cossett* has not, as yet, procured and delivered said quit claim deed, &c. Such is the substance, without the particularity of detail, of the answer. To this answer a demurrer was sustained, and the plaintiff had final judgment. *Branham* excepted.

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1861.

BRANHAM
V.
COSSETT.

It is manifest, from the statement of the case, that it falls within *Loomis et al. v. Donovan*, ante, p. 198, and that the demurrer to the answer should have been overruled.

Per Curiam.—The judgment is reversed, with costs. Cause remanded for another trial.

H. W. Harrington and *J. H. Vawter*, for the appellant.

H. C. Newcomb and *J. Tarkington*, for the appellee.

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1861.

COOK v. BEAN, Administrator of BURBRIDGE.

COOK
v.
BEAN.
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Suit upon a promissory note. Answer: that the note was given for the purchase money of real estate sold by title bond, and that the deed, which was to have been executed on payment of the note, had not been tendered. On the trial, the truth of the answer being established, the Court held the case under advisement until a deed could be made and tendered, and then gave judgment for the plaintiff.

Held, that this was erroneous.

Held, also, that the doctrine that a specific performance will be decreed where the party is able at the rendition of the decree to perfect title, only applies to cases where some secret defect is discovered in the title, previously unknown, perhaps, to either party, and does not operate to excuse a party from doing all in his power to fulfill his contract.

Saturday,
December 14.

APPEAL from the *Owen* Common Pleas.

PERKINS, J.—Suit upon a note. Answer: that it was given for the purchase money of a tract of land, for which a deed, pursuant to a title bond executed at the time, was to be made on payment of the note, and that no deed had been tendered. Reply in denial. Trial; evidence establishing the truth of the answer; whereupon the Court held the case under advisement till the plaintiff could cause a deed to be tendered, which being done, judgment was rendered for the plaintiff.

This was erroneous. It was like permitting a party to sue on a note before it is due, but suspending judgment till it becomes due, and then rendering it against the defendant, thus harassing him with a suit before he is liable to pay. It is true that a general doctrine is laid down, that a specific performance may be enforced where the party is able to perfect title at the rendition of the decree; but that doctrine does not apply to excuse a party from being diligent, from doing all in his power to fulfill his contract; it does not apply to excuse a tender of a deed, made a condition precedent to the right to sue. It applies in cases where a party has tendered a deed, given possession, &c., but where some secret defect is discovered in the title, previously unknown, perhaps, to either party. In such case, if the party can cure the defect before decree, judgment

will go in his favor. An examination of the cases cited in Fry on Specific Performance, *vide* p. 253, and Adams' Equity, *vide* p. 84, *et seq.*, and notes, shows this.

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1861.

Per Curiam.—The judgment is reversed, with costs. Cause remanded, &c.

JENKINSON
v.
EWING.

R. L. Hathaway and A. T. Rose, for the appellant.

JENKINSON v. EWING.

Suit for the purchase money of real estate. Answer: that the premises were, at the time of the conveyance, incumbered by a lien for taxes, which the defendant had been compelled to pay.

Held, that the answer was bad for not showing that the conveyance contained a covenant against incumbrances.

The recovery of a general judgment upon the notes secured by a mortgage is no bar to an action of foreclosure upon the mortgage.

The act of 1859 gives the Court of Common Pleas a jurisdiction unlimited as to amounts.

APPEAL from the *Allen* Common Pleas.

Saturday,
December 14.

WORDEN, J.—This was an action commenced in *September*, 1859, by *Ewing* against *Jenkinson*, to foreclose a mortgage, for an amount exceeding one thousand dollars. The defendant answered in four paragraphs; to the second and fourth of which a demurrer was sustained. Trial by the Court of the issues formed upon the other paragraphs; finding and judgment for the plaintiff. The defendant appeals, and relies upon three points for a reversal of the judgment, *viz.*, the ruling upon the demurrer to the second and fourth paragraphs of the answer, and that the sum in controversy was beyond the jurisdiction of the Court.

The second paragraph was only pleaded in bar of the sum of forty dollars, and alleges, in substance, that the consideration of the notes, to secure which the mortgage was given, was a sale and conveyance to the defendant of the mortgaged premises; that the premises, at the time of the

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1861.

BURTCHE
v.
THE STATE.

conveyance, were incumbered by a lien for taxes, to the amount of forty dollars, which the defendant has been compelled to pay, wherefore, &c.

This paragraph is defective for the following, if no other, reason: It does not appear that the defendant protected himself against incumbrances by any proper covenants, and for aught that appears he may have purchased subject to incumbrances, taking a mere quit claim conveyance.

The fourth paragraph sets up a former recovery of judgment, in the same Court, by the plaintiff against the defendant, upon the notes secured by the mortgage.

That the recovery of the judgment is no bar to an action to foreclose the mortgage, is settled by the case of *Hensicker v. Lamborn*, 13 Ind. 468. Moreover, the paragraph in question sets up a recovery for more than a thousand dollars, at a time when the Court had no jurisdiction to that amount; hence the judgment is a nullity.

The last point made, viz., that the Court had not jurisdiction of the amount here involved, has already been passed upon by this Court, *vide Kiger v. Franklin*, 15 Ind. 102, where it was held that the act of 1859 gives the Court of Common Pleas unlimited jurisdiction as to amount involved.

There is no error in the case; hence the judgment must be affirmed.

Per Curiam.—The judgment is affirmed, with 3 per cent. damages and costs.

M. Jenkinson, for the appellant.

BURTCHE v. THE STATE, on the Relation of RICHARDVILLE.

Suit against the sureties of an administrator, on a bond given by him on an application to sell real estate, to recover the proceeds of the land sold. Answer: that the administrator, in his lifetime, fully paid and accounted for all of said moneys, except the sum of \$892, which the defendant as his surety had since paid in full. Reply: that after the payment of said alleged balance by the surety, a further accounting took place in the

Court of Common Pleas, in the matter of said estate; and by the judgment of said Court said administrator was found in arrears, over and above said supposed balance, in the sum of \$1,125. Nov. Term,
1861.

Held, that the reply was a departure, as the money therein sought to be recovered was not shown to have been of the proceeds of the real estate sold, for which only the surety was liable. BURTON
v.
THE STATE.

APPEAL from the *Knox* Circuit Court.

*Saturday,
December 14.*

WORDEN, J.—This was a suit by the State, upon the relation of *Richardsville*, as administrator *de bonis non* of the estate of *Charles A. Marachall*, deceased, against *Burtch*. One *Alvin W. Tracy* was appointed administrator of the estate of *Marachall*, and procured an order from the proper court to sell certain real estate, and the defendant *Burtch* became his surety on the bond required to be given for the faithful accounting for the proceeds of such sale. *Tracy* having died, and the relator having been appointed as such administrator *de bonis non*, this suit was brought on the bond thus executed by *Tracy*, with *Burtch* as surety, alleging that *Tracy* sold a large amount of land and received the purchase money therefor, for which he failed to account, &c.

The defendant pleaded, among other things, that *Tracy*, in his lifetime, fully administered, paid and accounted for all the moneys which came to his hands from the sale of said lands, except the sum of \$892.31, which the said defendant and *Nicholas Smith*, (a co-surety,) after the death of *Tracy*, fully paid and satisfied to the plaintiff.

To this answer the plaintiff replied, that after accounting for \$892.31, and the payment thereof, as in the answer alleged; a further accounting took place in the Court of Common Pleas of *Knox* county, &c. on *January 12*, 1854, in the matter of the administration of the estate of said *Marachall*, and by the judgment of said Court thereon the said *Tracy*, as administrator as aforesaid, was found in arrear, and over and above said sum of \$892.31, the further sum of \$1,125, for which said last mentioned sum this suit is instituted.

The plaintiff moved to reject this replication, but his motion being overruled, he demurred thereto, but the demurrer was also overruled and exception taken. Trial by the Court; finding and judgment for the plaintiff for \$1,860.75.

Nov. Term, 1861. The ruling of the Court in refusing to reject the replication, and in overruling the demurrer thereto, are assigned for error.

KNOWLTON

v.
SMITH.

The objection to the replication is, that it departs from the ground of action stated in the complaint. We think the objection was well taken. The plaintiff could only recover for money received by *Tracy* on the sale of land. That is all that is secured by the bond executed by *Burtch*. The replication does not specify from what source the \$1,125 came. The language of the reply would by no means limit the claim to money received for lands, but would admit of proof of the sum named being found in arrear from any other source. Indeed, the replication admits, because it does not deny, that the moneys received by *Tracy* on the sale of the land have been accounted for, as alleged in the answer, but sets up a right to recover the \$1,125 found due upon a general accounting. This is not only a departure, but an attempt to hold *Burtch* upon a claim for which he did not make himself responsible.

Per Curiam.—The judgment is reversed, with costs. Cause remanded, &c.

John Baker, for the appellant.

Samuel Judah, for the appellee.

KNOWLTON v. SMITH.

Saturday,
December 14.

APPEAL from the *Cass* Circuit Court.

Per Curiam.—Suit by *Smith* against *Knowlton* and others upon promissory notes. *Knowlton*, only, answered. At the *May* term, 1859, the issues were made up, and the cause continued for the plaintiff to answer interrogatories. At the *November* term, 1859, the defendant *Knowlton* obtained leave to file additional paragraphs to his answer, upon an affidavit, as the record informs us, showing the necessity of such paragraphs. Upon the additional paragraphs being

filed, the defendant applied for a continuance to procure testimony pertinent to those paragraphs. The continuance was refused, and there was final judgment for the plaintiff. The affidavit for a continuance seems to us to have been sufficient, under the circumstances, to require a continuance of the cause. It is objected to as not showing sufficient diligence to procure the testimony. The affidavit on which leave was granted to file the additional paragraphs of the answer is not before us, hence we must presume that ruling to have been correct. The paragraphs being filed, and replies in denial thereof, the defendant was entitled to procure evidence to sustain them. He shows in his affidavit for a continuance that some of his witnesses resided in the State of *Illinois*, but in what part he had been unable to learn, but that he expected, if the cause should be continued, to learn their residence, and procure their testimony at the next term. We think, under the circumstances, the continuance should have been granted.

The judgment is reversed, with costs. Cause remanded, &c.

W. Z. Stuart and D. D. Dykernan, for the appellant.

E. Walker, for the appellee.

Nov. Term,
1861.

KRATMAYER

v.
BRINK.

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KRATMAYER v. BRINK.

Where real estate is sold by title bond, the purchaser is not, in the absence of a stipulation to that effect, entitled to the possession of the land before the time for making the conveyance, and though he may have entered into possession with the consent of the vendor, the latter may resume his possession at any time, on demand.

Where the vendee of real estate enters into possession under the contract of purchase, with the consent of the vendor, such entry does not constitute him a tenant.

A reply averring a demand of possession after entry, and before suit brought, is sufficiently certain, on demurrer.

APPEAL from the *Vanderburgh* Circuit Court.

WORDEN, J.—Action by *Brink* against *Kratemayer*, to recover the possession of certain real estate.

Saturday,
December 14.

Nov. Term, 1861. Answer: that on *February* 27, 1861, the defendant purchased the land of the plaintiff for the sum of \$550, and the plaintiff executed an agreement (which is set out) to convey the land to the defendant upon the payment of the purchase money, and that on the said *February* 27, the defendant, with the consent of the plaintiff, entered into the possession of the land, under and by virtue of the said sale and purchase, and has held the same until the present time.

KRATMAYER
V.
BRINK.

By the agreement set out, it appears that \$70 of the purchase money was paid at the time the contract was made, but the residue thereof was not due when the suit was brought, hence the defendant was not in default in respect to the payments. The agreement, however, is entirely silent as to the possession of the premises, and there is nothing in it that implies that the defendant was to have possession until the purchase money should be paid and the deed executed.

The plaintiff replied to the answer, that after the entry by the defendant upon the premises, and before the commencement of this suit, the plaintiff demanded possession of said premises from the defendant, who refused to surrender the same.

The defendant demurred to this replication, but the demurrer was overruled, and an exception taken. Final judgment was rendered for the plaintiff.

The demurrer, we think, was correctly overruled.

As the agreement did not provide for the defendant's possession, he was not entitled to it, and the plaintiff was entitled to resume his possession at any time he saw proper to do so. Nor does it make any difference that the defendant was not in default in respect to his payments. He had no right to the possession until the purchase money was paid as provided for in the agreement. As he entered, however, by the consent of the plaintiff, a demand of possession by the plaintiff was necessary, before the commencement of the suit, in order to place the defendant in the situation of a wrongdoer. This, the replication avers, was done. The entry by the defendant under the contract did not constitute him a *tenant* to the plaintiff, hence no notice to quit for any

particular length of time was necessary. These views are fully sustained by the cases of *Taylor v. McCracken*, 2 Blackf. 260; *Stackhouse v. Doe*, 5 Blackf. 570; *Doe v. Brown*, 7 Blackf. 142; and *Spencer v. Tobey*, 22 Barbour, 260. It is urged that the rule should be different in equity. We perceive no difference, in respect to the rights of the parties under the contract, at law and in equity.

But it is objected that the reply is too indefinite and uncertain, in not stating the time and place of the demand, and whether it was verbal or in writing. The reply states that the demand was made after the entry, and before the commencement of the suit. That was good, in substance, and sufficient on demurrer. If the reply was too uncertain in the particulars pointed out, application might have been made, under § 90 of the code, to require it to be made more certain by amendment. *Godfrey v. Godfrey*, ante, p. 6.

It may be observed, that the judgment for the plaintiff in no way interferes with the rights of the defendant under his contract. If he performs the contract on his part, he will be entitled to the same remedies against the plaintiff for failure on his part as if this suit had not been brought.

Per Curiam.—The judgment is affirmed, with costs.

A. L. Robinson, for the appellant.

Asa Iglehart and *C. E. Marsh*, for the appellee.

Nov. Term,
1861.

LINTZ
v.
HOYT.

LINTZ v. HOYT and Others.

APPEAL from the *Tippecanoe* Common Pleas.

Per Curiam.—Suit by the appellees against the appellant, upon promissory notes. Judgment for the plaintiffs for \$1,013.65

Saturday,
December 14.

The only question in the case is, whether the Court below

Nov. Term, 1861. had jurisdiction of the amount involved. The suit was brought after the act of 1859 took effect. That the Court had jurisdiction, was settled by this Court at the last term.

Booe
v.
Caldwell.

Vide Kiger v. Franklin, 15 Ind. 102.

The judgment is affirmed, with 1 per cent. damages and costs.

H. W. Chase and *J. A. Wilstach*, for the appellants.

W. H. Coombs, for the appellees.

BOOE v. CALDWELL.

Saturday,
December 14.

APPEAL from the *Fayette* Circuit Court.

Per Curiam.—This case was tried some years ago in the *Fayette* Circuit Court, and a judgment was rendered for the defendant. The plaintiff appealed to this Court, where the judgment below was reversed, and the cause remanded for another trial. *Booe v. Caldwell*, 12 Ind. 12. Another trial was had, which, like the former, resulted in a judgment for the defendant. A second appeal is now taken by the plaintiff to this Court. The suit was instituted against *Watson & Caldwell*, as partners. No service was had upon *Watson*, and as to him the suggestion of not found was made, and the suit proceeded against *Caldwell*. *Caldwell* introduced the deposition of *Watson* to prove that *Watson* was alone liable for the demand sued for. We think the deposition was rightly admitted. It was objected that the name of the witness was not indorsed on it; but that was a question of fact for the Court below. That Court does not admit that the indorsement was not upon the deposition. Probably the requisition for indorsement is but directory, but this we do not decide. The deposition is entitled well enough. It explains itself in the body.

The trial seems to have been fair; the evidence is in the

record, and justifies the verdict and judgment below. The instructions covered the case. Nov. Term,
1861.

The judgment is affirmed, with costs.

B. F. Claypool and *E. Vance*, for the appellant.

Reid and *Walker*, for the appellee.

EWING
v.
HATFIELD.

EWING v. HATFIELD and Another.

The title of a cause is only matter of form, and not of substance.

No formal levy of a certified copy of a judgment of sale in a foreclosure suit is necessary, because the judgment itself designates the particular property to be sold.

An offer to sell would be a commencement of the execution of the judgment, and where execution has been commenced before, it may be completed after, the return day.

The issuing of a subsequent void writ, while the original valid one is still in the hands of the officer, would not vitiate action under the original.

APPEAL from the *Perry* Circuit Court.

*Saturday,
December 14.*

Per Curiam.—*Comstock* and others had a mortgage upon property of *Ewing*. A foreclosure was had upon this mortgage, and judgment for the sale of the specific property. At the proper time, a certified copy of the judgment issued to the sheriff.

There was a clerical error in the title of the foreclosure suit; but the title is but matter of form *Perk. Prac.* 165.

No formal levy of a certified copy of a judgment of sale in a foreclosure suit is necessary, because the judgment itself designates the particular property to be sold, and no other could be levied on under the copy of the judgment, at least till that designated had been sold, nor without a provision in the judgment authorizing it.

An offer to sell would be a commencement of the execution of the judgment; and where execution has been commenced before, it may be completed after, the return day, (*Tillotson v. Doe*, 5 Blackf. 590,); and the officer who had commenced the execution might, at common law, complete

Nov. Term, 1861. it, even after going out of office, (3 B. Monroe, 304,) and after the death of the defendant. 7 Blackf. 154; *id.* 549.

CASSEL
v.
SCOTT.

The issuing of a subsequent void writ, while the original valid one was still in the hands of the officer, would not vitiate action under the original.

On questions of fact, turning upon the evidence, this Court rarely disturbs the judgment below.

As to the necessity of moving to set aside executions and sales for irregularities, see *Doe v. Dutton*, 2 Ind. 309.

The judgment is affirmed, with costs.

Chas. H. Mason, for the appellant.

Ballard Smith, for the appellees.

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139	272
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157	170

CASSEL v. SCOTT and Others.

Suit to restrain the collection of a judgment rendered upon certain bonds filed with the county auditor, under the provisions of the act of *March 4, 1853*, to regulate the sale of spirituous liquors, &c., (Acts 1853, p. 87.) The complaint alleged that the act under which the bonds were filed was unconstitutional and void, and that the judgment, for that reason, was a nullity.

Held, that the act being unconstitutional and void, the bonds were not supported by a legal consideration; but the judgment rendered thereon, though erroneous, was not void, but must be regarded as operative until reversed by a court of error.

Saturday,
December 14.

APPEAL from the *Wayne* Circuit Court.

DAVISON, J.—This was a suit for an injunction. The appellant was the plaintiff, and the appellees were the defendants.

The complaint alleges these facts: At the *Spring* term, 1856, one *Gabriella Hunnicutt* recovered a judgment in said Court against *Cassel*, the plaintiff in this action, for one thousand dollars, which judgment was rendered upon certain bonds filed by the plaintiff in the auditor's office of *Wayne* county, under the provisions of an alleged act, entitled "An Act to regulate the retailing of spirituous liquors, and for the

suppression of the evils arising therefrom. Approved *March 4, 1853*;" which act the said *Gabriella* alleged, and the said Court held, to be valid and operative; but which act the plaintiff avers, was, has been, and now is, unconstitutional and void, in consequence whereof the judgment rendered upon said bonds, was, and still is, void and of no effect whatever. It is averred that *Andrew F. Scott*, the clerk of said Court, having been ordered to do so, issued an execution on said judgment, and delivered the same to *Joseph S. Stidman*, the sheriff, who by virtue of said execution has levied on certain property of the plaintiff, (describing it,) which he, the sheriff, has advertised for sale on *March 25, 1859*, and will sell the same on that day unless restrained by order of this Court.

Nov. Term,
1861.

CASSEL
v.
SCOTT.

The relief prayed is, that upon final hearing the sheriff be enjoined from selling or keeping possession of said property under the execution, and that *Scott*, the clerk, be perpetually enjoined from issuing any other or further execution upon said judgment, &c., and that other relief be granted, &c.

Appended to the complaint, there is an affidavit of the plaintiff alleging the matters and things therein stated to be true, &c. The record shows that the plaintiff, having given the notice and filed the undertaking prescribed by the statute, moved the Court for a restraining order, in accordance with the prayer of the complaint, to operate during the pendency of the suit; that the defendants appeared in pursuance of the notice; but the Court overruled the motion, refused the order, and the plaintiff excepted, and thereupon the defendants demurred to the complaint, their demurrer was sustained, and the suit dismissed, &c. For a reversal, it is argued that the act of 1853, referred to in the complaint, is in conflict with the Constitution, and that the judgment on the bonds, having no foundation, save in that act, is a nullity. The first branch of the argument is correct. We have decided the act in question to be unconstitutional. *Merslmeir v. The State*, 11 Ind. 482. It does not, however, follow that the judgment is a nullity. It was founded upon the bonds, and not on the act, and of the suit upon them, the Circuit Court had full jurisdiction. The act being void, the bonds

Nov. Term, 1861. are simply unsupported by any valid consideration; and this being the case, the judgment rendered upon these bonds, though it may be deemed erroneous, is not void, and must be held operative until, in accordance with the ordinary rules of procedure, it is reversed by a court of error. No authority has been cited, nor do we know of any, in support of the position assumed by the appellant. In our opinion, the judgment, as it now stands, is in full force and operative, and the result is, the motion for the restraining order was correctly overruled.

THE CINCINNATI,
NATI, & C.
RAILROAD Co.
v.
COCHRAN.

Per Curiam.—The judgment is affirmed, with costs.
C. H. Burchenal and *M. Wilson*, for the appellant.
Julian, Morton and *Kibbey*, for the appellees.

THE CINCINNATI, PERU AND CHICAGO RAILWAY COMPANY and
Others v. COCHRAN.

Saturday,
December 14.

APPEAL from the *Wabash* Circuit Court.

Per Curiam.—In this case the Court admitted parol evidence of a written subscription of stock, without any excuse for the absence of the original; and without any attempt to produce a certified copy from the books of the corporation. This was error, for which the case must be reversed; and the general confusion which appears in the transcript shows that the case has not been tried understandingly upon any point involved.

The judgment is reversed back to the complaint with costs, with leave to both parties to amend, &c.

Pettit and *Cowgill*, for the appellants.
J. Brownlee, for the appellee.

ROBINSON and Another v. BUSH.

Nov. Term,
1861.APPEAL from the *Boone* Circuit Court.

HILL

v.

HAVERSTICK.

Per Curiam.—Three judgments simultaneously rendered. Executions in the hands of sheriff upon all at same time, one subject to appraisement, two not; sale of forty acres of land without appraisement, and proceeds applied in payment of all the executions, satisfying all in full. According to the case of *Shirk v. Wilson*, 13 Ind. 129, the sale was valid. In actions to recover possession of real property, the entire case is tried upon the general denial.

Affirmed, with costs.

Hamilton and Nave, for the appellants.*A. J. Boone*, for the appellees.Saturday,
December 14.

HILL v. HAVERSTICK.

APPEAL from the *Marion* Common Pleas.Saturday,
December 14.

PERKINS, J.—*Eli Haverstick* sued *John F. Hill*, to recover personal property, to wit, 200 bushels of *Hungarian* grass-seed, of the value of nine hundred dollars, which he alleged the defendant unlawfully detained. The defendant answered:

1. General denial.

2. That he received the grass seed at his store, from one *Ward*, to whom he was accountable, and whom he recognized as the owner, to sell on commission, and claimed a lien upon it for storage, &c., to the amount of two hundred dollars, which he alleged should be paid before removal of the seed by the plaintiff, the true owner. It nowhere appears that *Ward* was the agent of the true owner, or that the latter was a purchaser from *Ward*. The Court sustained a demurrer to the second paragraph of the answer, and exception was taken. But, nevertheless, the record states that the plaintiff replied to the second paragraph of defendant's answer, denying every allegation therein.

Nov. Term,
1861. A jury then came to try the issues. They found for the plaintiff, and as the property was not delivered to the sheriff upon the writ, the plaintiff had judgment for its value.

McKEE
v.
McDONALD. The evidence is not of record. This case is not governed by *Hanna v. Phelps*, 7 Ind. 21, but by *Coffin v. Anderson*, 4 Blackf. 395. See Story on Bailment, p. 297. Perhaps the defendant might have called upon the plaintiff and Ward to interplead. Perk. Prac. 143.

Per Curiam.—The judgment below is affirmed, with 1 per cent. damages and costs.

John L. Ketcham and *James Mitchell*, for the appellant.
B. K. Elliott, for the appellee.

McKEE v. McDONALD and Others.

In proceedings for a new trial under § 356 of the code for causes discovered after the term, the record of the previous trial is not the foundation of the suit, and hence, a transcript thereof need not be filed with the complaint.

Saturday,
December 14.

APPEAL from the *Putnam* Common Pleas.

PERKINS, J.—Suit to obtain a new trial. Demurrer to the complaint sustained; final judgment for the defendants, denying a new trial. The suit was commenced at the *February* term, 1860. The complaint states that at the *September* term, 1860, a suit was tried in the *Putnam* Common Pleas, wherein *McDonald*, *Daggy* and *Daggy* were plaintiffs, and *McKee* was defendant, being the parties to the present suit reversed; that judgment was rendered in said suit against *McKee* for a large sum, to wit, &c.; that the judgment was thus rendered upon the testimony of *Jacob Daggy*, who swore that he was not a partner in the firm of *McDonald & Co.*, and had no interest, &c.; and who further swore that said *McKee* told him, about *November* 1, 1859, that he, *McKee*, had bought eleven or twelve hundred hogs for *McDonald & Co.*, at four dollars per hundred, pursuant to a

contract with said company; that he was taken by surprise by this testimony, as it was contrary to the facts, and in no manner expected, and he could not then rebut it, though in truth, he had purchased but four hundred instead of twelve hundred hogs; and in truth, said *Daggy* was a partner in interest, &c.; and that said *McKee* has, since the term of said trial, discovered evidence by which he can prove the facts as in this complaint he states them, &c. He further states that *Daggy* was the only witness who swore to facts as stated in his testimony.

Nov. Term,
1861.

McKEE
v.
McDONALD.

The statute provides (2 R. S., § 356, p. 119) that a new trial may be applied for, within a year after final judgment, for causes discovered after the term, which application shall be by way of complaint, to which the adverse party shall answer, and when issue is formed, it shall be tried by the court upon the evidence that may be adduced, and a new trial granted or refused, as the court may determine upon the evidence.

The record of the previous trial is not the foundation of the suit in this class of actions, and a transcript of it need not, therefore, be made a part of the complaint.

The evidence of the witness *Daggy* went, in the original trial, to the establishment of two facts, to wit: that he was not a partner with *McDonald, & Co.*, and that *McKee* had bought twelve hundred hogs for *McDonald & Co.* The newly discovered evidence is to disprove these alleged facts; and though it may thus indirectly impeach *Daggy*, such is not the direct object of the evidence. We incline to think the Court should have overruled the demurrer, required the defendants to answer, and heard the application on its merits.

Per Curiam.—The judgment below is reversed, with costs. Cause remanded for further proceedings, &c.

John A. Matson and *J. A. Scott*, for the appellant.

Williamson and *Daggy*, for the appellees.

Nov. Term,
1861.

CADWALADER and Others v. HARTLEY and Others.

CADWALADER
v.

HARTLEY.

Where a person summoned as a garnishee answers that he was indebted to the attachment defendant, but that before the service of the writ of garnishment, he was notified of the assignment of the note constituting such indebtedness, if the plaintiff desires to dispute such assignment for want of consideration or for fraud, it is proper, if not necessary, to bring the person claiming to hold as assignee, before the Court, so that he may be bound by the judgment; and on the trial of an issue thus formed, the attachment defendant would be a competent witness.

Quære: Whether the question of a fraudulent transfer can, if objected to, be tried in the garnishment proceeding.

Saturday,
December 14.

APPEAL from the *Putnam* Circuit Court.

PERKINS, J.—*Cadwalader & Co.* commenced suit against *Tileman Hartley*, on a note which he had given to them. The maker of the note was the only proper party defendant to the suit upon it; judgment was obtained against him upon the note. At the commencement of the suit *Cadwalader & Co.* procured an attachment, and also a process of garnishment against the debtors of *Tileman Hartley*. Among them, process of garnishment was served on *James Taylor*, March 21, 1857. *Taylor* answered, that in *January*, 1857, he was indebted to *Tileman Hartley* by promissory note in the sum of \$900, and that on *February* 15, 1857, he was notified that said note was transferred by assignment, to one *John Hartley*, who still held said note. He does not say whether the note was one governed by the law merchant, or not, but it appears by the record that it was not. This answer would bar a judgment in favor of the plaintiff against the garnishee if the assignment set up could not be successfully denied, or avoided. If the plaintiff concluded to attempt its avoidance by replying that the assignment was without consideration, or fraudulent, it would be proper, if not necessary, for him to ask that the assignee, *John Hartley*, should be brought before the Court, that he might be bound by the judgment. He was brought before the Court in this case; and on the trial of the issues made between the plaintiff, the garnishee, and assignee, it would seem that the defendant to the original action would be

a competent witness. He would not be a party to the garnishment branch of the suit, and would be legally disinterested even between the parties to that. He was made a witness in this case. See the *Junction, &c. Co. v. Cleneay*, 13 Ind. 161; and *Stetson v. Cleneay*, 14 *id.* 453. The Court below refused an amendment to a replication, but it seems that evidence was heard, the same as though the amended replication had been filed; and such amendments as that asked in this case are much in the discretion of the Court trying the cause.

Nov. Term.
1861.

WEBB,
v.
DEITCH.

Quære: If the objection had been made, could the question of the fraudulent transfer have been tried in the garnishment proceeding?

Per Curiam.—The judgment is affirmed, with costs.

J. A. Matson, J. A. Scott and J. Cowgill, for the appellant.
Williamson and Daggy, for the appellees.

WEBB and Another v. DEITCH.

An answer setting up usury goes only to a part of the cause of action, and should only assume to answer so much, since an answer that assumes to bar the whole cause of action, and in fact only bars a part is bad on demurrer.

APPEAL from the *Johnson* Circuit Court.

Saturday,
December 14.

Per Curiam.—Suit upon note; general answer that the note was usurious. Usury does not render a note void under our statute, for the principal. An answer of usury, therefore, goes to only a part of the cause of action. Such an answer should not, therefore, assume to answer the whole cause, but should be, that as to so much of the plaintiff's cause of action, viz., the amount of the usury, the defendant answers; because an answer that assumes to go in bar of the action, and only on its face bars a part, is bad, not containing facts sufficient to bar the action. In the case at bar the defendant did not limit his answer to a part of the cause of

Nov. Term, 1861. action, but put it in to the whole, and claimed a judgment in his favor.

BOOKER
v.
RAY. The judgment below must be affirmed, with 1 per cent. damages and costs.

*T. W. Woollen and C. F. McNutt, for the appellants.
Overstreet and Hunter, for the appellee.*

BOOKER and Another v. RAY.

At common law, even where the statute of frauds required a contract to be in writing, and it actually was so, it was not necessary that a copy of the writing should be made a part of the declaration, nor that it should even be averred that the contract was in writing.

The averments of a pleading may be made certain by reference to diagrams filed with, and made part of, the pleading.

*Saturday,
December 14.*

APPEAL from the *Wabash* Circuit Court.

PERKINS, J.—This was an action commenced while the code of 1843 was in force. The cause of action was set forth in a declaration, drawn according to the forms at common law. It was an alleged breach of contract for the erection of a building. At common law, even where the statute of frauds required a contract to be in writing, and it actually was so, it was not necessary that a copy of the writing should be made a part of the declaration, nor that the declaration shall aver that the contract was in writing.

In this case the declaration described a contract for the erection of a building, and it described the building in parts, by diagrams, making them parts of the averments, thus: "the story is to be eight feet high in the clear, with three sets of purlins of suitable size, to be framed for the support of the roof; and posts are to be put in said building as designated in the following figures, viz.," (then follows an accurate drawing, representing the frame of the building as it is to be

erected, showing its dimensions, and the number, position, size, &c., of the several pieces of timber to be framed into it. Nov. Term, 1861.

We think an averment may be made sufficiently certain by this mode, and that those thus made in this case, are so. If diagrams may form a part of a valid contract, why not of a complaint upon such contract? *Locke*, in his work on the Human Understanding, says, in book 4, chap. 3, "*Diagrams*, drawn on paper, are copies of the ideas in the mind, and not liable to the uncertainty that words carry in their signification." A demurrer was, however, sustained to it below, and the case was dismissed. This was error, and the judgment must be reversed.

Per Curiam.—The judgment is reversed, with costs. Cause remanded, with leave to amend so as to conform the pleadings in the cause to the new code of practice.

D. D. Pratt and John N. Pettit, for the appellants.

DEARTH
v.
THE STATE.

DEARTH v. THE STATE.

The liquor law of 1859 does not give an appeal from the judgment of a justice in a prosecution for a violation of that law, and as the general statute on the subject of appeals from justices in criminal cases only gives an appeal to the Common Pleas, no appeal will lie to the Circuit Court from the judgment of a justice for a violation of the liquor law.

APPEAL from the *Carroll* Circuit Court.

Saturday,
December 14.

PERKINS, J.—*Dearth* was fined by a justice of the peace of *Carroll* county, for a violation of the liquor law of 1859. He appealed to the *Carroll* Circuit Court. On the motion of the prosecuting attorney, his appeal was dismissed.

The liquor law of 1859 gives the Circuit Court, the Common Pleas, and justices of the peace, jurisdiction of violations of that act. Jurisdiction means the power or right, in a court, to hear and determine a cause. But after jurisdiction has been conferred, generally, upon a court, the question

Nov. Term, 1861. still arises, how is that jurisdiction to be acquired in a particular case? Is it through original institution of suits,

STRANGE

v.

PRINCE.

or through appeals from inferior courts? The liquor act in question, points out but two modes in which jurisdiction may be acquired of given cases, viz., by original institution, and through recognition, by a justice, to the Circuit or Common Pleas, of the defendants in such causes, instituted before a justice, as he can not properly punish, and, hence, is incompetent to properly try. It does not give appeal as one of the modes of placing a cause in any court. Turning to another statute to see how appeals may be taken, we find they are, in criminal cases, authorized to be taken to the Common Pleas alone, and the right of appeal is entirely regulated by statute. See Perk. Prac. 38; 2 R. S., § 10, p. 498.

If there is any other statute authorizing an appeal in criminal cases to the Circuit Court, we have not been cited to it, nor are we aware of its existence.

Per Curiam.—The judgment below is affirmed, with costs
J. C. Applegate, for the appellant.

STRANGE v. PRINCE.

The statute seems to contemplate that the record of the Court of Conciliation shall only affect the question of costs, and hence it may be given in evidence to the Court, instead of the jury, to enable it to determine which party shall be taxed with the costs.

Where the statement of the judge of a court of conciliation, as to the identity of the record of his court, was received in the Court below without putting him under oath as a witness, it must be presumed that the parties waived the administration of the oath.

Where the record of a court of conciliation recites that the parties appeared, the notice need not be set out.

Saturday,
December 14.

APPEAL from the *Davies* Circuit Court.

PERKINS, J.—*Prince* sued *Philip Strange* for slander. The jury gave him a verdict for one cent as damages

The plaintiff, then, to show himself entitled to costs, gave in evidence to the Court papers of the following tenor. Nov. Term,
1861.

"To *Charles Strange, John Strange, and Philip Strange*.
Gentlemen: You are notified that I have a cause of action against you for slanderous words spoken of me by you; and are required to appear before the Court of Conciliation in relation thereto, on *June 29, 1860, (Tuesday)* at the hour of twelve o'clock, M. of said day, at the office of Judge *Richard A. Clements*, in the town of *Washington*, in *Daviess* county, State of *Indiana*, for the purpose of compromising the same,
June 15, 1860. "PRESLEY K. PRINCE."

"Duly served, *June 22, 1860.*

"*B. GOODWIN, S. D. C.* By *R. AIKMAN, Deputy.*"

"And, also, (says the record,) a paper which the judge of the Court of Common Pleas stated at the time, he being present and one of the counsel for the plaintiff, was the original entry of conciliation made by him as the judge of said Court, said record being in the words and figures following, to wit:

"PRESLEY N. PRINCE

v.

CHARLES STRANGE,

JOHN STRANGE,

and

PHILIP STRANGE.

} Record of Conciliation. Slanderous words.

"On this 29th day of *June 1860*, come the above named parties, plaintiff and defendants, and their respective rights being explained to them, they refuse to conciliate.

"Witness my hand, day and year above written.

"*R. A. CLEMENTS, C. C. P.* and

Ex Officio Judge C. C."

As the statute seems to contemplate that the record of the Court of Conciliation shall only affect the question of costs, we think it may be given in evidence to the Court, instead of the jury, to enable it to direct which party shall be taxed with the costs.

When a party is about to give a record in evidence, he examines the keeper thereof as to its genuineness; but it is not unusual for the adverse party to waive his being sworn, and

Nov. Term, take his simple statement. When this is done, that state-
 1861. ment is evidence. We must presume in favor of the judg-
 THE STATE ment below that such was the character of the statement
 v. of Judge *Clements* in this case as to his record; and, under
 BARBOUR. the decision in *Beach v. Woolford*, 7 Ind. 351, we must hold
 the record admissible in evidence.

We think its contents sufficient, inasmuch as no settle-
 ment was effected. It states that the parties appeared, which
 supersedes the necessity of reciting the notice, &c.

We think, also, the notice and record *prima facie* applica-
 ble to the case. Slander is a several, not joint tort; and
 when the plaintiff notified three to attend, he must be taken
 to have called them all severally before the Court prepara-
 tory to a several suit against each one, if he should see fit to
 prosecute such.

Per Curiam.—The judgment is affirmed, with costs.

J. W. Burton and *John Baker*, for the appellant.

L. Q. De Bruler and *R. A. Clements, Sr.*, for the appellee

THE STATE, on the Relation of SUMPTER v. BARBOUR.

Where, in a prosecution for bastardy, the defendant is discharged, &c., on
 account of the failure of the relator to appear, the judgment, not being
 upon the merits, is not a bar to a further prosecution.

The failure of the justice to enter of record a finding that the defendant
 was the father of the child is of no consequence, where the defendant is
 recognized.

Saturday,
 December 14.

APPEAL from the *Parke* Circuit Court.

PERKINS, J.—Prosecution for bastardy. On *October* 10,
 1855, *Jane Sumpter* filed an affidavit with *Warren Harper*,
 a justice of the peace, charging *Orman Barbour* with having
 begotten a bastard child of which she had been delivered.
 The justice issued a writ for *Barbour*, returnable forthwith.

On *February* 19, 1856, it appears by the transcript, the

Nov. Term,
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V.
BARBOUR.

defendant was before the justice upon the writ; and because the prosecuting witness was not present, she having had no notice from the justice of the fact of the defendant being brought before him, the justice discharged the defendant. On *March* 5, following, we learn from the transcript that the defendant was again before the justice, the prosecuting witness being also present, when the justice refused to hear evidence against the defendant. On the 14th of the same month the Circuit Court issued a mandamus compelling the justice to hear the cause. On the 17th of the same month the cause was heard, and the defendant, who was present, was recognized to the *Vigo* Circuit Court, to answer to the charge of bastardy made against him; but a formal judgment that he was the father of the child was not entered by the parties.

The defendant appeared to the action in the *Vigo* Circuit Court, pursuant to his recognizance, and obtained a change of venue to the *Parke* Circuit Court.

In that Court the cause was dismissed because the justice had discharged the defendant on *February* 19, and because on *March* 17 the Court did not enter a formal judgment that the defendant was the father of the child.

There were no grounds for dismissing the prosecution. The judgment of discharge, on *February* 19, was not upon the merits and was no bar to further prosecution, even if it had been pleaded as such. Ind. Dig., p. 181. The informality in the judgment on *March* 17, was of no consequence; the binding over to the Circuit Court implied pretty strongly that the justice considered the defendant guilty, and was a sufficient hint to him to settle with the mother if he desired to. The judgment, had it been formerly entered, would have had no effect in the Circuit Court, where the case was to be tried upon the facts. The recognizing of the putative father is not an appeal from a judgment.

Per Curiam. — The judgment is reversed, with costs. Cause remanded, &c.

C. Y. Patterson, for the appellant.

W. Mack, I. N. Pierce and *E. Glick*, for the appellee.

Nov. Term,
1861.

McINTIRE v. WHITNEY, PRESIDENT OF THE INDIANA BANK.

McINTIRE
v.
WHITNEY.

An answer, setting up defense of usury in bar of too much of the cause of action is bad.

Saturday,
December 14.

APPEAL from the *Jefferson* Circuit Court.

PERKINS, J.—Suit upon a bill of exchange of the following tenor:

“EXCHANGE FOR \$1,500.

“MADISON, IND., *July 29, 1858.*

“Four months after date of this first of exchange, (second unpaid,) pay to the order of myself, at the *Northern Bank of Kentucky*, at *Louisville*, fifteen hundred dollars, value received, without any relief from valuation laws.

“J. O. McINTIRE.

“To Mr. SAM'L BROWN, *Louisville, Ky.*

“Accepted, S. BROWN.”

[Indorsed,] “J. O. McINTIRE.”

This bill was indorsed to the president of the *Madison Bank*, who was the drawer and acceptor.

The defendant answered: 1. Denying each and every allegation of the complaint. 2. And for further and second answer the defendant says he made said bill for the accommodation of the acceptor, who transferred it to the *Bank of Madison*, receiving therefor the sum of thirteen hundred and twenty dollars; that one hundred and eighty dollars was taken for the discount of the bill; that it was usury; that the bank knew all the facts, and that the object of the bill was to obtain a loan, &c.

The plaintiff demurred to this second answer, because it did not contain facts sufficient to bar the plaintiff's action. The Court sustained the demurrer. The defendant refused to amend the answer; and, upon the bill as evidence, the Court rendered judgment for the plaintiff for the amount of it.

Did the Court err in sustaining the demurrer? This is the only question. The answer went in bar of the whole cause of action. Did it contain facts sufficient to bar the entire action? If not it was bad. Clearly, it did not. Usury, supposing the answer to show usury, (a point we do not

decide,) only bars a recovery for interest—it does not bar a recovery for the principal; and, by the act of *March*, 7, 1861, only the usurious interest is barred. Acts 1861, p. 138. See, as to the usury, *Hosier v. Eliason*, 14 Ind. 523. Now, what was the Court to do on this answer? The demurrer to it had to be sustained or overruled as a whole. It was pleaded as a bar to the action. Was it such? Clearly not. It was bad as to a part, in fact; hence, it was bad, in law, as to the whole.

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1861.

SPURRIER
v.
BRIGGS.

The answer should have been as to one hundred and eighty dollars, part of the cause of action, so that the plaintiff, in reply, could have craved and had judgment for the balance, and made his issue on the disputed portion. This rule is well settled. We can not depart from it in this case. *Brown v. Perry*, 14 Ind. 32.

Per Curiam.—The judgment is affirmed, with 1 per cent. damages and costs.

Harrington and Allison, for the appellant.

Geo. W. Richardson, for the appellee.

SPURRIER and Others v. BRIGGS.

Suit by *A.* against *B.*, *C.* and *D.*, alleging that before that time he had a judgment against *B.* and *C.*, who were also indebted to certain other persons, and that it was agreed between the plaintiff and defendants, that if plaintiff would enter satisfaction of his said judgment, and would pay said other debts, the defendants would execute to him a note for the amount of said judgment and said debts, to be discounted by the *Ohio Insurance Co.*, for his benefit; that plaintiff did accordingly enter said satisfaction and pay said debts, and the defendants, on their part, executed said note, with the said *D.* as surety thereon, payable to the *Ohio Insurance Co.*; and the said company refused to discount the same, wherefore the defendants became liable to pay the amount thereof to the plaintiff, &c.

Held, that the note was made for the benefit of *A.*, though payable to the

Nov. Term, insurance company, and was valid notwithstanding the company declined to receive and discount it.

1861.

SPURRIER

v.

BRIGGS.

Held, also, that as the beneficial interest of the note was in *A.*, he was entitled to sue thereon in his own name.

A motion for a new trial on the ground that the verdict is not sustained by sufficient evidence, will not present any question of "excessive damages," as that is made by statute a distinct cause for a new trial.

A prayer for judgment in a complaint upon a promissory note for the amount of the note and interest thereon, is good, without summing up the amount of principal and interest.

Saturday,
December 14.

APPEAL from the *Floyd* Circuit Court.

WORDEN, J.—Suit by *Briggs*, against *Spurrier*, *Gavin* and *Smith*. There are three paragraphs in the complaint.

First. In substance, that *Briggs* held a judgment against *Gavin* and *Spurrier*, for, &c., and that they owed to plaintiff, and to others, certain named debts, and that *Gavin* owed to the *Ohio Insurance Co.*, &c. That it was on, &c., agreed between plaintiff and defendants, that if plaintiff would enter satisfaction of said judgment, and pay said other debts, defendants would execute and deliver to him a note for the amount of said judgment, debts, interest and costs, to be discounted by the *Ohio Insurance Co.*, for his benefit. That plaintiff complied, &c. That defendants executed and delivered the note; but the *Ohio*, &c., refused to discount the same; wherefore defendants became liable to pay, &c.

Second. For money paid for use of defendants.

Third. On an account stated.

A demurrer to the paragraph was overruled. *Gavin* was defaulted. The other defendants answered, severally, in denial.

On the trial the case was submitted on an agreed statement of facts, which so far as the point of liability was involved, is "that the note in the first count was executed by the makers thereof to be discounted by the said insurance company, and that the said company refused to discount the same, and never acquired any interest therein. Said *Briggs* obtained a judgment as alleged. It was then agreed, by and between said *Briggs* and said *Gavin* and *Spurrier*, that if said *Briggs* would enter satisfaction of said judgment, said *Gavin* and *Spurrier* would execute a note to said *Ohio Insurance*

Co., with said *Smith* as surety thereto, which note was to be discounted for the benefit of said *Briggs* by said company; that said *Briggs* entered satisfaction of said judgment, and said note was executed by the parties thereto," &c.

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v.
BRIGGS

This was all the evidence in the case. Finding for the defendants on the *second* paragraph of the complaint, and for the plaintiff on the *first*, for the amount of the note, and interest at ten per cent., as therein provided.

Errors are assigned upon the ruling of the Court in overruling the demurrer; in overruling the motion for a new trial; and in rendering judgment for \$600.

The appellants claim that no action can be maintained by the plaintiff on the note, it having been made payable to the insurance company, and not to him, and the company never having received and discounted the note, it never had any legal existence. This view is certainly countenanced by the case of *The President, &c., of the Bank of Indiana v. Ross*, 1 Blackf. 315. But there is one material distinction between that case and the present. There *Shannon* owed *Canby*. *Shannon* and *Ross* made a note, payable to the bank, for discount, and in the event of its being discounted, *Canby* was to draw the funds and place them to the credit of *Shannon*. *Canby's* claim against *Shannon* was not to be at all affected, unless he should procure the funds upon the discount of the note. He parted with nothing and gave no acquittance of any claim. But here the case is entirely different. *Briggs*, in pursuance of the agreement, has entered satisfaction upon his judgment, and furnished the money to pay off the specified debts, while the defendants have fully discharged their agreement, unless they are bound to pay the note to the plaintiff. It is difficult to perceive on what ground the plaintiff could have had the entry of satisfaction set aside, or have any claim against the defendants or either of them except upon the note.

If the plaintiff can not recover upon the note, he loses his judgment and the money he has advanced; and this would be so manifestly inequitable, that we incline to hold the note as made for the benefit of the plaintiff, and valid, although not received and discounted by the insurance company. It

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can make no difference to the defendants, whether they pay the note to the company, or to the plaintiff. The beneficial interest in the note being in the plaintiff, he is entitled, under the code, to sue thereon in his own name. The demurrer, we think, was correctly overruled.

The appellants insist that the motion for a new trial should have prevailed, as the note being usurious, viewed as a note payable to the plaintiff, nothing could be recovered but the principal. We do not think any question of this kind is properly before us. The reason for a new trial was, simply, that the finding of the Court was not sustained by the evidence, and was contrary to law. If the damages found were excessive, and more than the note warranted, the motion for a new trial should have been made upon that ground. The statute specifying the causes for which a new trial may be granted, names "excessive damages," as one, and, "that the verdict or decision is not sustained by sufficient evidence, or is contrary to law," as another, clearly contemplating that the former is not embraced in the latter.

It is also insisted that the judgment for six hundred dollars is erroneous, that sum being more than the damages claimed in the complaint. The complaint demands judgment for \$465.44, (the amount of the note,) together with interest from April 4, 1855, (the date of the note.) This we understand to mean, with interest at the rate specified in the note. Were it a proper case for the allowance of such interest, (the contrary of which, we do not decide, as it is admitted that the insurance company were authorized to take ten per cent.,) there could be no doubt, we think, that this demand of interest would relate to the rate of interest specified in the note, and so we regard it, whether the specified rate be legal, or otherwise. Thus construing the demand, the complaint claims more than the judgment is rendered for. The demand is not objectionable for not summing up the total of principal and interest demanded. The amount can be rendered certain by computation, and that is sufficiently certain which can thus be rendered certain.

We find no error in the proceedings which should reverse the judgment.

HANNA, J.—The foregoing opinion of the Court, prepared by Judge WORDEN, was pronounced at the *May* term, 1860; a rehearing was afterward granted, and the case again submitted at the last *May* term. After careful deliberation, we still adhere to the conclusion first arrived at. It should be recollected, that at the time the judgment of this Court was pronounced, in the case of *The President, &c. v. Ross*, 1 Blackf. 315, and which appears to stand in the way, that proceedings in law and equity were distinct in our courts. It was then determined that a suit would not lie on the note which was made to be, but was not, discounted by the bank. As between the bank and the defendant, in that case, there was really no consideration, although, it is true, the Court say the note had no legal existence; whether that was so or not, upon the facts there disclosed, we do not determine, for the facts in this case are slightly different; and that difference, it appears to us, is in favor of the plaintiff in this case. In that case, it is shown there was an existing debt from *Shannon to Canby*; but how, or under what circumstances, it accrued, or was secured, is not disclosed; whether *Ross*, the other maker of the note, had, or had not, any thing to do with the creation of said debt we do not know.

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SPURRIER
v.
BRIGGS.

Here it pleaded and agreed, that the defendants, which includes *Smith*, the joint maker, but surety, should execute this note, payable to the company, but to be used for the benefit of the plaintiff, that is, discounted for his benefit. This was done in consideration that plaintiff would do certain other things. So far as *Ross* was involved, it is not shown that there was any consideration for his signature and promise. Here the plaintiff entered satisfaction of his judgment, and advanced his money to pay debts, upon the undertaking of all the defendants. It can not be that such engagement was fully discharged by the mere execution of the note, and that if not discounted the same should be, for all purposes considered, thereafter, invalid. Whatever the legal rule would be, certainly the equity would be that, as the plaintiff had advanced his money upon the faith of the promise of the three men, he should not be driven to a proceeding against two of them only, and that not upon the note.

Nov. Term, 1861. The promise was to one person, but was for the benefit of another. That other was the real party interested. Our statute is, that the real party in interest shall sue. Promises made to one, for the benefit of a third person, have been enforced by this Court, at the suit of such third person, although not a party to the instrument in which said promise was contained. See *Allen et al. v. Davison*, 16 Ind. 416; *Woodberry v. Duvall*, 15 Ind. 160.

WALDO
v.
WALTERS.

Although the company refused to receive and discount the note, we do not think the promise therein contained ceased to have any binding efficiency. The company acquired no interest in the note; and if no other rights had intervened, it would then have performed its office; but another had an interest in that promise, and an equitable right to insist upon its performance, so far as the payment of the amount is concerned, independent of the action of the said company.

Per Curiam.—The judgment below is affirmed, with 1 per cent. damages and costs.

W. T. Otto and J. S. Davis, for the appellants.

J. M. Wilson, for the appellee.



WALDO and Others v. WALTERS and Another.

The lien of a mechanic for work done, or materials furnished, in the construction or repair of a house, &c. does not attach, that is, is not acquired, until the notice of intention to hold the lien is filed in the recorder's office of the proper county.

Saturday,
December 14.

APPEAL from the *Marion* Common Pleas.

HANNA, J.—This was a proceeding, under the statute, to enforce a mechanic's lien. The appellees were the plaintiffs, and *Azel Waldo, Jane Waldo* and *Gustavus Schurman* were defendants. The complaint alleges these facts: In the year 1859, the plaintiffs furnished, for a new brick building on lot No. 10, in square No. 93, in the city of *Indianapolis*, 69,000

bricks. The building was in process of erection, and intended as a residence for *Azel Waldo*, and his wife, *Jane Waldo*, and the lot on which it was erected, was, at the time the bricks were furnished, the property of *Jane Waldo*. The bricks were furnished for, and used in, the building, with her consent and for her benefit, and the same were of the value of \$4.50 per thousand, making an aggregate value of \$310, of which *Jane Waldo* has paid \$100, leaving still due and unpaid, \$210. On *October 21, 1859*, the plaintiffs filed in the recorder's office of *Marion* county, within the time prescribed by the statute, notice of their intention to hold a lien on the property for the amount due as aforesaid; a copy of which notice is filed with the complaint and made a part of it. Plaintiffs aver, that on *October 13, 1859*, *Azel Waldo*, and *Jane Waldo*, his wife, conveyed said lot No. 10 to *Gustavus Schurman*, for the consideration of \$1,000; and they, in fact, say that the bricks were furnished by them, and put into the building prior to the execution of the conveyance to *Schurman*.

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WALDO
v.
WALTERS.

The relief prayed is, that the lot and building be sold for the satisfaction of said lien, and for general relief, &c.

A demurrer to the complaint was filed and overruled. This presents a question upon the sufficiency thereof. It will be perceived that the sale and conveyance of the premises is alleged to have taken place before the notice of the lien was filed. It was held in *Green v. Green*, 16 Ind. 253, that under the peculiar phraseology of the present statute in reference to mechanics' liens, a lien does not attach, is not acquired, until notice filed, although this Court held differently, (*Goble v. Gale*, 7 Blackf. 218,) under a statute of such different phraseology that we could not consider it a ruling that was, to any considerable degree, binding in said case. We are now referred to the case of *Vandyne v. Vanness*, 1 Halst. Ch. R. (N. J.) 485. This case is not at all in point, because that statute was so different from ours; it created a lien for materials, &c. that continued, &c. for two years, but no longer, unless the claim therefor should be filed and suit commenced in six months, &c. In the case cited the Court recognizes the fact that the statute creates the lien. We think our statute does not do so, but gives a

Nov. Term, 1861. lien from the time a certain act is performed, namely, filing the notice.

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v.
ROBB.

The Court erred in overruling the demurrer to the complaint.

Per Curiam.—The judgment is reversed, with costs. Cause remanded, &c.

Thos. D. & R. L. Walpole, for the appellants.

N. B. Taylor and *B. K. Elliott*, for the appellees.

THE STATE v. ROBB.

Section 21 of the general election law (1 R. S. 1852, p. 263) was intended to, and does, preclude the election board from taking testimony relative to the right of any person to vote, who may offer to take the oath therein prescribed.

It is the duty of the inspector or judge to state to one who offers to vote and is challenged, the requisites to entitle him to cast such vote; if he still persists in his offer, and swears, or offers to swear, they can refuse to swear him, and even after they have sworn him may refuse his vote, but they do so at the peril of being able to show that he was not a legal voter, upon a prosecution for refusing the vote.

The board are only liable for the rejection of a *legal* vote, and though the person offering to vote may have taken the oath, yet the penalty for rejecting his vote would not attach if the board should be able to show that he was not a legal voter.

When the person offering to vote takes the prescribed oath, the board are justified in receiving his vote, unless it can be shown that they acted corruptly, and were cognizant of the fact that he was not a legal voter.

Saturday,
December 14.

APPEAL from the *Morgan* Common Pleas.

HANNA, J.—This was a prosecution against *Robb*, who, it is averred, as inspector of an election, knowingly, willfully, and contemptuously refused and neglected to receive the vote when offered at, &c., of one *Adam Winingham*, who was then and there a legal voter of, and in, &c.

The defendant was tried and acquitted. The case is brought here upon questions reserved by the State, in

reference to rulings upon the admission of evidence, and the refusal of instructions. Nov. Term.
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It is stated in the bill of exceptions, that it was proved the person who offered to vote, had resided in the township, &c., for from eight to twelve months preceeding said day of election on which he offered his vote to said defendant, who was then the legal and acting inspector, &c., and his right to vote being challenged, he proposed and offered to take the oath, &c., and that defendant, as such inspector, refused to administer said oath, or to permit him to vote, after which defendant was permitted to introduce the evidence of one, &c., who testified that said *Winningham* had a wife and children residing in *North Carolina*, and that he was supporting them, and intended to return thither and join his family.

The instructions asked and refused, were as follows:

1. "The oath of the voter is in all cases the primary, and to the election board, conclusive evidence of his right to vote."

2. "When a person offers to the proper officer of an election his vote, and his right to vote is challenged, if he takes, or offers to take, the oath prescribed by § 21 of the general election law, he is, so far as said officer is concerned, a legal voter, and such officer is bound to receive his vote."

It is insisted, that a person tendering a vote can judge and determine for himself as to whether he is entitled to cast it; that if he insists upon his right to vote, after being challenged, and informed of the qualifications of a voter, and will take the oath in the said § 21 of the act regulating elections, &c., then the vote must be received (1 R. S., §§ 20, 21, 22, p. 263); but if he will not be sworn, but persists in his offer to vote, evidence shall be heard, and the board shall determine thereupon as to his right.

The determination of this question is necessary in the case at bar, because the prosecution was had under the act of *December 23, 1858*, p. 40, which provides that any inspector, or judge of, &c., "who shall knowingly and willfully, or corruptly, refuse or neglect to receive the vote of any legal voter."

Who is to determine whether the person offering to vote

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Nov. Term, is entitled to exercise the right of suffrage, under these statutes? The statute last referred to does not, in manner, refer

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to what is necessary to make a man a legal voter. We must refer to other laws to ascertain that fact; and it is, therefore, insisted that we must be governed by those other statutes as to the manner of determining who are legal voters. On the other side, it is urged that in a prosecution against an inspector he should be permitted to show that the person who offered his ballot was not a legal voter; that all he did was to prevent the said person from corruptly voting.

It is manifest that the Legislature intended to, and by § 21, quoted does, preclude the board of election officers from taking testimony relative to the right of any person to vote, who may offer to take the oath therein provided. It is the duty of such officers to state, to one who offers to vote and is challenged, the requisites to entitle him to cast such vote. If he still persists and swears, or offers to swear, they can refuse to swear him, and even after they so swear him, refuse his vote; but they do so at the peril of being able to show that he is not a legal voter, upon a prosecution against them for neglect of official duty, or a suit by the voter for deprivation of the right to exercise the elective franchise. If he will not take the oath, but other evidence of his right to vote is heard, as provided in other sections, then they are permitted to determine, as best they can, from that evidence, without having to combat the *prima facie* case made against them by the oath of the voter. It is manifest that this right must rest in the board under the law of 1858, for they are liable only for the rejection of a legal vote. If a man, not a legal voter, was refused, after having taken the oath, the penalty would not attach when the board should be able to show that fact. It is also clear, that if the board received the vote of one who swears, such oath justifies them, unless it can be shown that they acted corruptly, which would be the case if they were cognizant of the fact that he was not a legal voter.

Per Curiam.—The judgment is affirmed, with costs.

W. V. Burns, for the State.

W. R. Harrison, for the appellee.

BALL and Another v. SILVER.

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1861.BALL
v.
SILVER.

Suit upon a promissory note. Answer: that the plaintiff was not the owner of the note; but that one *A.* was the owner, the said *A.* having, before that time, agreed to receive, and the said plaintiff to deliver to him, the said note, in full settlement for certain professional services rendered by *A.* for the plaintiff.

Held, that *A.*'s right to sue for the value of the alleged services was neither suspended nor extinguished by the agreement to receive the note, broken as it was by the plaintiff, and therefore the title to the note, and the right to sue upon it, remained in the plaintiff.

APPEAL from the *Tippecanoe* Circuit Court.Saturday,
December 14.

HANNA, J.—Suit upon a note. Answer, among other things, that “3. Said note, before the bringing of this suit, was fully satisfied by professional services rendered said plaintiff, by *Joseph J. Brooks*, an attorney at law, which said services were tendered in behalf of said defendant by said *Brooks* in discharge of said note; and said plaintiff agreed to receive, and did receive, the same in full discharge of said note.” A demurrer was sustained to this paragraph, which ruling is assigned for error.

It is conceded by the appellant, that formerly a promise by one, for the benefit of a third, person, could not be enforced at law; but it is insisted that it could be in equity, and that the proceedings in the case at bar are valid under our present code of procedure. We are referred to *Bird v. Lanius*, 7 Ind. 615. In that case, it was averred that *Bird* was the surviving member of a firm, to the deceased partner in which advances had been made, in money, horses, &c., some before and some after the formation of the partnership, to aid in the work which was the object of that partnership; that *Bird*, when he entered the partnership, by written articles agreed with his partner “to be at equal expense,” &c., “taking into account sums before then advanced by either party,” &c., and property then used was to be considered joint property and be equally paid for by each party. In that case the Court held, that as *Bird* had the benefit of the advancements, and promised his partner to pay, &c., he was bound by this promise; and he for

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whose benefit it was made might enforce it. In the case at bar, so far as disclosed by the record, *Brooks* was an entire stranger to the original contract, a volunteer in the offer to so discharge it; had not, either before that time, or afterward, received any consideration from defendants for that promise or offer. But see note to *Cumber v. Wayne*, 1 Smith's L. Ca. 469.

But even if it was error to sustain the demurrer to the third paragraph of the answer, still there was an answer of payment in, under which it appears to us, the evidence of the transaction, so pleaded, was equally admissible, if legitimate at all. *Louden v. Birt*, 4 Ind. 566; *Tilford v. Roberts*, 8 *id.* 254.

A demurrer was also sustained to the sixth paragraph of the answer, which averred that the plaintiff was not the owner of the note, but that the title was in said *Brooks*, "said *Brooks* having heretofore, &c. agreed to receive, and said plaintiff having agreed with said *Brooks* to deliver to him, said note in full settlement and discharge of certain professional services previously rendered by said *Brooks* in behalf of plaintiff, who at said settlement and afterward continually excused the non-delivery of said note on the ground that it was in the custody of his agent or mislaid."

The general averment that the plaintiff was not the owner of the note was not sufficient. *Lamson v. Falls*, 6 Ind. 309. Did the facts set forth show a transfer of the ownership or title to *Brooks* by the payee? On the one hand it is insisted that they do; on the other, that they show only an unexecuted agreement to transfer. The note was not assigned in writing, nor delivered without such assignment. Its remaining, and being found in the possession of the payee, would, unexplained, be a strong circumstance against the position that the ownership was changed. The pleader therefore, attempts to explain and excuse the possession. If *Brooks* had obtained possession of the note under the facts pleaded, he would, in equity, have been considered the owner, and in this State would have been enabled to sue in his own name as the real party in interest. If he had brought such suit, averring that he had thus purchased said note and that

the same was lost, could he have maintained the suit? A solution to this inquiry depends, perhaps, upon the answer to another, namely, whether the right of action which *Brooks* possessed, to recover on his claim for services, was suspended or extinguished by the agreement to receive the note of defendants, suspended, if the note was to be received conditionally or as a collateral, and extinguished, if by the agreement it was to be in discharge of said debt.

The failure, by the plaintiff, to perform his agreement with *Brooks*, perhaps, gave him a right of action for such breach. But we are of opinion such broken agreement did not either suspend or extinguish the right of action which *Brooks* had for the alleged services; and, therefore the title to the note remained in the plaintiff, and consequently the right to sue on it.

Per Curiam.—The judgment is affirmed, with 3 per cent. damages and costs.

G. S. Orth and J. A. Stein, for the appellants.

R. C. & J. Gregory, for the appellee.

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DOUGHTY
v.
HAMILTON.

DOUGHTY v. HAMILTON.

APPEAL from the *Marion* Common Pleas.

Saturday,
December 14.

Per Curiam.—Suit upon note and mortgage. Appearance and answer; issue; trial; judgment for the plaintiff. No exceptions, and no errors to found any on. Time case.

The judgment is affirmed, with 3 per cent. damages and costs.

K. Ferguson, for the appellant.

B. K. Elliott, for the appellee.

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1861.

ROSSER v. BINGHAM.

ROSSER
v.
BINGHAM.

In *August*, 1850, *A.* obtained a decree in chancery against *B.*, for the specific performance of a contract for the purchase of a tract of land, by which said land was ordered to be conveyed to him. A commissioner was appointed to make the deed, which was made, reported to the Court, approved, and recorded among the records of the Court, but was not recorded in the recorder's office until *January*, 1855. Pending the suit for specific performance, *B.* sold and conveyed the land to *C.*, who afterward conveyed to *D.*, who purchased for a valuable consideration, and in good faith, and had his deed duly recorded.

Held, that by the law requiring the recording of deeds, it was intended that such record should be constructive notice, and should dispense with proof of actual notice of incumbrances, transfers, &c.

Held, also, that the record of the chancery suit was not such constructive notice as was binding upon the purchasers subsequent to *C.*

Held, also, that though the statute (R. S. 1843, § 86, p. 845) made the decree itself, in the absence of a commissioner's deed, operate as a transfer of title in substance therein specified, yet to constitute notice, it should be recorded in the county where the land is situated.

Saturday,
December 14.

APPEAL from the *Tippecanoe* Circuit Court.

HANNA, J.—*Bingham* brought suit to recover possession of a certain tract of land, and to quiet the title thereto. Plaintiff had judgment for twenty-six acres. By brief of counsel, and agreed statement of facts filed, but a single point is presented for our consideration.

In *August*, 1850, *Bingham* obtained a decree in chancery in the Circuit Court in said county against one *Jeffries*, for the specific performance of a contract, before then entered into, for the purchase of said land, whereby the same was ordered to be conveyed to him, a commissioner appointed and a conveyance made, reported to the Court, approved, and recorded among the records of said Court; but not in the recorder's office, among the records of deeds, until *January* 23, 1855.

In the mean time, before the decree, *Jeffries* had by separate deeds conveyed the land in two parcels. As to the fourteen acres not recovered by *Bingham*, in this suit, there is now no controversy. As to the twenty-six acres, for which judgment was recovered, one *Webster*, to whom the same

had been conveyed pending the suit for a specific performance, and who held possession some time after the determination of that suit, to wit, in 1852, conveyed the same to one *Johnson*, under whom the defendant claims. *Webster*, and those claiming under him, had their several deeds duly recorded in the recorder's office. *Johnson* paid \$250 for the land, in good faith, and was put in possession.

The question presented is, whether, under these circumstances, *Johnson* acquired a good title, in consequence of the fact that the commissioner's deed to *Bingham* was not placed upon record in the recorder's office of the county, until after he had purchased?

At that time the section of R. S. 1843, §25, p. 418; § 54, p. 423, was in force, requiring all deeds and instruments whereby any estate or interest in lands might be affected in law or equity, except, &c., to be recorded in ninety days; if not, to be considered fraudulent, &c. as against subsequent purchasers, in good faith, and for a valuable consideration. Also, §3, p. 454, which provided, that all judgments, &c. should be a charge and operate as a lien upon real estate liable to execution, &c.; and §85, p. 845, to wit, that "The decree of a court of chancery shall, from the time it is pronounced, have the force, effect, and operation of a judgment at law." And also, §86, *id.*, to wit, "When a decree shall be made for a conveyance, &c. and the party against whom such decree is made does not comply therewith, &c., such decree shall be considered, deemed, and taken, in all courts of law and equity, to have the same operation, force and effect, and be as available in every respect as if the conveyance had been executed according to the decree."

The law requiring the registry or recording of deeds, &c. was intended as constructive notice, and to supply the place, or rather to dispense with the proof, of actual notice of incumbrances, liens, transfers, &c., of lands. If the deed of the commissioner had been recorded it would have been constructive notice to all, of the claim of *Bingham* to the lands in dispute. 1 Story's Eq., § 403. Was the record of the court of chancery such notice as ought to have put *Johnson* upon his guard and upon inquiry. 1 Story's Eq., § 400 and

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note. It is admitted that *Webster*, having purchased pending suit, did not acquire a valid title, but it is insisted that, as *Bingham* did not record his deed in ninety days, *Webster* had the power to sell and convey, and a purchaser, for a valuable consideration without actual notice, might acquire a valid title to the lands after that time.

It has been held by this Court, *Ricks v. Doe*, 2 Blackf. 346, that actual notice of the prior conveyance makes the subsequent purchase fraudulent, and therefore the purchaser was not entitled, as a purchaser in good faith, to the benefit of a statute similar to that of 1843. This appears to be placed upon the ground that where the subsequent purchaser had notice of the prior unrecorded conveyance, he could not be said to be a purchaser in good faith. See, also, 1 Story's Eq., § 397, and cases cited. In the case at bar the statement of facts is, that the deed to *Johnson* "was executed for the consideration of two hundred and fifty dollars, which was paid in good faith by said *Johnson*," &c.

The question again recurs, was the record in the chancery proceeding constructive notice, and if so, what was the effect of that part of the agreed statement of facts above quoted? We are of opinion that the record was not such constructive notice as was binding upon the purchasers subsequent to *Webster*. See Sug. on Vend. and Pur., chap. 17, as to the common law on that point. We are not very well able to perceive any good reason distinguishing this case from that of a judgment at law followed by a sale under an execution issued thereon. In the latter class of cases, it has been decided that a purchaser at sheriff's sale, who fails to have his deed duly recorded, stands, in respect to the registration laws, as if he had purchased from the execution defendant. It seems to follow, that his title, thus situated, might be defeated by a purchase of a later date, made without notice, in good faith, and for a valuable consideration. *Doe v. Hall*, 2 Ind. 556; *Orth v. Jennings*, 8 Blackf. 420. It is true, the judgment at law does not transfer the title, as it is supposed the decree in certain instances may, under the statute; but nevertheless, a sale upon an execution, and the return thereon, form a record, and might, in like manner, be said to put the

purchaser on inquiry. At the time of the rendition of this decree, an action to enforce a specific performance was not, as at present, local to the county where the land was situated; and it appears to us that, although the statute, in the absence of a commissioner's deed, made the decree itself operate as a transfer of title in instances and for reasons therein specified; yet it is manifest that, to be constructive notice, it should be recorded in the county where the land was situated. If this is the general rule, we do not think that the fact that the suit to enforce specific performance, in this instance, happened to be brought in the county where the land was situate, should make it an exception to the general rule. If it had been brought in any other county, a decree obtained, and commissioner's deed, and neither recorded in the county where the land was, certainly a purchaser could not be held to have constructive notice.

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1861.

HASSELBACK
v.
SINTON.

Per Curiam.—The judgment is reversed, with costs. Cause remanded, &c.

S. A. Huff, for the appellant.

E. H. Brackett, G. S. Orth and J. A. Stein, for the appellee.

HASSELBACK and Others v. SINTON and Another.

It is no part of the duty of a clerk to place among the orders of the Court which he is directed to enter, the reasons or causes which influenced the Court in directing such order; but if the ruling is objected to, it should go upon the record by a regular exception taken and signed.

Suit upon a bill of exchange against the drawer and acceptor, the complaint alleging, as to the acceptor, that he accepted the said bill in writing, &c. Answer, by the acceptor, under oath, that he "did not undertake and promise as averred," &c.

Held, that the answer did not put in issue the execution of the acceptance.

APPEAL from the *Know* Circuit Court.

Saturday,
December 14.

HANNA, J.—The appellees, who were holders and indorsees of a bill of exchange, sued the appellants as acceptors, and

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others as drawers and indorsers of the same. The bill was payable to the drawers, who were the immediate indorsers of the plaintiffs. At the *September* term, 1858, there was judgment against the drawers who were indorsers as aforesaid.

As to the other defendants, the record shows that the case was continued from term to term, for divers reasons, until the *August* term, 1860, at which time all the papers in the case were lost; in the language of the record, "abstracted in open court, during the present term." An order was thereupon made, that the attorneys and clerk, &c., should file affidavits, &c., which are made part of the record, and show that said papers, as above stated, were lost. Thereupon, on leave of the Court, the plaintiffs filed a copy of their original complaint, to which the defendants demurred, which demurrer was sustained, and plaintiffs amended and moved the Court, supported by affidavit, that defendants be made to answer on the next day, which was so ruled. On that day *Hasselback* answered, under oath, that he did not "undertake and promise," as alleged, and filed therewith interrogatories, to be answered by plaintiffs. The attorney for the other defendants moved the court, supported by his affidavit, to continue the cause, to enable them to file answer and interrogatories. The cause was then continued to special term in *November*, and an order made that said answer and interrogatories should be filed "within twenty days from this date." They do not appear to have been filed within the time limited. At the *November* term, the entry of the clerk states that the parties appeared, and "*Wright, Jones and Pidgeon* moved the Court now here for leave to file answers in substitution of their original answers heretofore filed in said cause and lost, in these words." The clerk then set out said several answers, and the exhibits accompanying the same; and further states, "which notice was objected to by the plaintiffs' attorneys, and overruled and refused by the Court, to which ruling said defendants except. And because said defendants had failed to file their answer herein, in vacation, as ruled and ordered by this Court, and said complaint being unanswered by said defendants in manner aforesaid, plaintiffs pray the Court for judgment as upon default, as against *Wright, Jones and*

Pidgeon." Said record further states that said defendants being thereupon called, again appeared, and offered to file said answers at once, which was again refused. Said Court then found as upon a default, and rendered judgment, &c. Afterward, at the same term, the motion of *Hasselback* for a rule for answers to the interrogatories by him filed was overruled, and exception taken. Trial, and judgment against him.

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It is now argued that the Court erred in three particulars: *First.* In refusing to permit certain of the defendants to file answers at the *November* term, 1860. *Second.* That the judgment against *Wright, Jones* and *Pidgeon* at said term, was erroneous in not providing that payment of the judgment against the drawers and indorsers of said bill should operate as a satisfaction of the judgment against said acceptors. *Third.* It was error to refuse the rule on plaintiffs to answer the interrogatories of *Hasselback*, and to render a separate judgment against him.

As to the first, it is insisted that we have no rule days, and that the offer to file the answers on the first calling of the cause, at the next term after the rule to answer was entered, is a sufficient compliance with the rule, although, by the same, a day was fixed in vacation for filing said answers.

The appellees, as to said first objection, say that as there is no bill of exceptions, showing the grounds upon which the Court refused to permit appellants to file their answers, we must presume in favor of said ruling; but, if we can examine it, then the same is right, because there was no affidavit or other evidence that the answers presented were copies of those lost. We have a statute as follows: "If an original pleading or paper be lost or withheld by any person, the Court may authorize a copy thereof to be filed, and used instead of the original."

The Court having ruled out the answers which were offered, they form no part of the record, unless made so by bill of exceptions; we would be left, therefore, to conjecture as to whether they were rejected because they showed, on their face, sufficient reason to authorize such ruling, or otherwise, if it was not for the statement in the clerk's entry,

Nov. Term, giving the reason for such ruling. Can we notice that?
1861. If we can not, we will presume in favor of the action of the

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Court. It is no part of the duty of a clerk to place among the orders of the Court, which he is directed to enter, the reasons or causes which influenced the Court in directing such order. It would greatly incumber a record to undertake to place upon the order book all the facts leading to every order made. If the ruling is objected to, it should go among the records by a regular exception taken and signed.

As to the latter part of the third point, even if the trial as to *Hasselback* should not have taken place, after judgment against his co-contractors, (a point about which we need express no opinion,) yet as no objection was made below on that ground, the objection now falls within the case of *Johnson v. Vutrick*, 14 Ind. 216. As to the first part of said objection, the defendant, *Hasselback*, had filed a verified answer, that he did not "undertake and promise" as averred. The averment was that the defendants, (naming the acceptors,) by their firm name of *Hasselback, Wright & Co.* accepted, &c. It is insisted that this averment is put in issue by the answer. None of the interrogatories would have elicited evidence applicable to the issue, if such was formed, unless it was the third, which was as follows: "State whether at the time said bill was assigned to you by *Kratz & Hilman* they did not advise you that the same was made upon the sole responsibility of *Wright*, and against the known and positive instructions of the defendants, *Pidgeon* and *Jones*; and what information was given you by them at the time of said alleged assignment, respecting its execution."

The first inquiry under the form of the answer, would appear to be, whether the same put in issue the execution of the acceptance, which purported to have been executed as averred.

There are two classes of answers: first, a denial of each allegation of the complaint, controverted by the defendant; second, a statement of any new matter constituting a defense, &c., 2 R. S., p. 39; and all defenses except a mere denial of the facts alleged by the plaintiff, shall be pleaded specially. *Id.*, p. 42. Every material allegation of the complaint, not specially

controverted by the answer, shall, for the purposes of the action, be taken as true. *Id.*, p. 44. Now there was no express allegation that the acceptors undertook and promised to do any thing. The *fact* that they accepted the bill, in writing, addressed to them, requesting them to pay, at a future day, a named sum, was stated. If there was an undertaking and promise, upon their part, the same arose out of the act thus alleged to have been performed, as the legal consequence of that act. The answer did not deny, nor controvert, the performance of the said act, but avers, affirmatively, that the pleader did not take upon himself this legal result of the act said by the plaintiffs to have been by him performed. Did this sufficiently deny or controvert the performance of the alleged act?

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Under the old system a pleading which stated a mere conclusion of law was bad, *Warner v. Ha'field*, 4 Blackf. 394; so, blending matters of fact and law, 5 *id.* 193; so, pleading a conclusion of law, 1 *id.* 183; 2 *id.* 37, we suppose such pleadings would be equally open to objection now under the code. See *Seely v. Engell*, 17 How. 530; *Manice v. New York Dry Dock Co.*, 3 Edw. Ch. R. 143; *Will v. Comparet*, 14 Ind. 243.

Perhaps formerly, in assumpsit by the indorsee against the acceptor of a bill, and non-assumpsit pleaded, proof of the handwriting of the payee was required; but now that rule appears to have been changed by statute, 2 R. S., § 80, p. 44, which is, that, "where a writing, purporting to have been executed by one of the parties, is the foundation of, or referred to in any, pleading, it may be read in evidence on the trial of the cause against such party, without proving its execution, unless its execution be denied by affidavit before the commencement of the trial, or unless denied by a pleading under oath."

It is said that if the defendant fails to thus present the question of the execution of the instrument, he waives proof thereof, and excludes himself from offering evidence upon that point. *Unthank v. The Henry, &c.*, 6 Ind. 125.

We are not called upon to decide whether a general denial of each and every allegation in the complaint, verified by affidavit, would put in issue and require proof of the

Nov. Term, 1861. signatures to the acceptance; for the reason that we are of opinion that the answer in question did not amount to such general denial.

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It follows that any answers which might have been elicited to the interrogatories propounded, could not have been used under the issue pending, and the Court did not therefore err in refusing to compel such answers.

As to the second point of objection to the proceedings; it does not appear to have been raised in the Court below, and we do not think can be, under the circumstances, in this Court, for the first time.

Per Curiam.—The judgment is affirmed, with 1 per cent. damages and costs.

W. F. Pidgeon, for the appellants.

Samuel Judah, for the appellees.

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The holder of a claim as collateral security may sue on it, and hold the money when collected in place of the note or evidence of debt, even though the debt on which the collateral security was given is not yet due.

An answer to a suit upon a note held as collateral security, alleging that the note was assigned for the security of the plaintiff and one A., who is not joined as plaintiff, is bad, unless it be averred that the interest of A. in the note still existed at the time of the suit.

The word "contract" as used in § 23 of the act to authorize and regulate the business of general banking, (Acts 1855, p. 39,) which provides that "contracts made by such association and all bills," &c. "shall be signed by the president or vice-president, and cashier thereof," is employed in a limited, and not in its broad sense; and does not include a contract of indorsement of a note, which may, according to the usage of banks, be made by the cashier alone.

Where a promissory note is assigned as collateral security for a debt less than the amount of said note, the maker of the note may obtain and have a set-off against the payee to the amount of the excess of the note above the debt on which it was assigned as collateral.

Wednesday,
February 5.

APPEAL from the *Fayette* Common Pleas.

PERKINS, J.—*Hawkins* filed a complaint against *Jones* in

three paragraphs. The first alleged that on *December 11, 1857*, the defendant, *William C. Jones*, executed a written promise to pay *Henry Simpson*, annually, the interest on one thousand dollars; and that *Simpson* assigned the promise to the plaintiff, *Hawkins*. This paragraph did not make the writing, or a copy of it, a part thereof, by words in the formal part of the paragraph; but, at the close of the complaint, a copy of a writing, such as described in the paragraph, was given, preceded by an explanatory remark, referring back to the paragraph as being founded on the writing copied.

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The second paragraph was for interest on a note in writing, of like tenor with that described in the first paragraph, and was accompanied by a copy of the note. Both of the notes above mentioned were for a period of years, but expressed on their face, "with interest, payable annually." The third paragraph was for interest due on promissory notes, as per bill of particulars filed therewith, but the bill of particulars neither gave copies nor definite descriptions of any notes. This paragraph was bad for want of copies, and for uncertainty. No one of the notes described was payable at a bank. The complaint was not subject to any demurrer on account of any of the objections which were raised to it, as to the first and second paragraphs; and as no evidence was given on the third, the defendant was not injured by it. The defendant answered in three paragraphs.

1. General denial.

2. That the plaintiff held the notes as collateral security, only, and for a liability which had not matured; and that he received them for the security of himself and one *Stout*.

This answer was bad, because the holder of a claim as collateral security may sue on it and hold the money, when collected, in place of the note or other evidence of the debt. The debtor is not harmed. His payment of it, when due, to the then lawful holder, discharges him from the debt.

The answer was bad as to the interest of *Stout*, because it did not aver that his interest existed at the time of the suit; the *prima facie* case was with the plaintiff on the complaint, and copies of notes filed. The Court, however, held the answers good, and the plaintiff took issue of fact upon them.

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3. The defendant *Jones* answered by way of set-off, that he, before he had any notice of the assignment of the notes by *Simpson*, the payee, to *Hawkins*, the plaintiff, became the owner, by assignment from the Bank of *Connersville*, of a promissory note for \$2,000, made by said *Henry Simpson*; and he averred that said note was assigned to him by the bank, by an indorsement on the back thereof by the cashier of the bank.

An issue of fact was formed on this paragraph. The cause was tried by a jury, and the plaintiff recovered.

The point is made in this Court, that the third paragraph of the answer above set forth is bad, because it does not aver that the indorsement on the note was signed by the president and cashier of the bank.

The bank named is one created under the free banking law of *Indiana*. That law declares (§ 23) that "contracts made by such association, (bank,) and all bills and notes by them issued and put in circulation as money, shall be signed by the president or vice president, and cashier thereof."

It is said that the indorsement of a note is, a contract, and therefore must be signed by the president or vice president, and cashier.

We are satisfied that this is not a correct interpretation of the clause of the section of the act quoted. The word contract is there used in a limited, not in its broad sense. This is manifest from the fact, that in its broad sense it includes bills and notes to be circulated as money; hence the naming of those contracts in the act was tautology, if the Legislature understood that they had used the word contract in its broadest sense.

Again; the act says, bills and notes to be circulated as money shall be signed by the president and cashier; plainly implying that bills and notes not to be thus circulated may be executed in a different mode. The act thus construed, will regulate the business of free banks according to the usages and customs of banks generally. With them, notes issued to circulate as money are signed by the president and cashier; others by the cashier alone; but we will not

elaborate this point, as it will be fully illustrated in *Allison v. Hubbell*, *post*, p. 559. Nov. Term
1861.

On the question of the ownership of the notes sued on by the plaintiff, the defendant had the advantage, on the trial, of a bad answer, over which, nevertheless, the jury found against him; and, upon the evidence, we should be slow in disturbing the judgment below, on this point.

The remaining questions arise upon the note answered as a set-off, and upon instructions, &c. The facts touching the question of the set-off, are these:

On *December* 11, 1857, *William C. Jones* executed to *Henry Simpson* two notes, not governed by the law merchant, for \$2,000. On *February* 26, 1858, *Henry Simpson* delivered those two notes to *Amos R. Edwards*, as collateral security for \$1,604.23. On *March* 12, 1858, *Edwards* notified *Jones* that he held said two notes as collateral security for the above named sum.

Now what were the interests of these parties in the notes? Why *Jones* the maker, owed on them, \$1,604 to *Edwards*, and \$396 to *Simpson*, and had a right, under our statute allowing equitable set-offs, to thus apply claims against those individuals, severally, to those respective amounts.

On and after *March* 12, 1858, then, *Jones* had a right to procure and apply a set-off against *Simpson* on said notes to the amount of \$396, with the chance of applying a set-off to the full amount of the notes if they were redeemed by *Simpson*.

On *March* 20, 1858, *Jones* did obtain a set-off, being the note set up in the answer as against *Simpson*, to the amount of \$2,000. On *May* 18, 1858, *Simpson* redeemed the notes in question, from *Edwards*, and they were redelivered to him.

Here, then, if no other interest intervened, *Jones'* entire set-off would remain as against the notes he had given to *Simpson*; but, under any circumstances, his set-off to the amount of \$396 might hold good.

On *March* 10, 1858, *Hawkins* bought the notes on *Jones* of *Simpson*, and while they were yet in the hands of *Edwards*; but they were not delivered to him till after

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Nov. Term, *Simpson* had redeemed them on *May* 18, 1858, and it is not
 1861. clear, from the evidence, that the property in them passed
 BEAL till then, and *Jones* was not notified of *Hawkins'* purchase
 v. till *December* 30, 1858.

RAY. Under any aspect, this case presents, then, *Jones* was enti-
 tled to a set-off to the amount claimed by the plaintiff in
 this suit, it being less than \$396. What we have thus said
 upon the facts, will meet all the questions upon instructions,
 &c., necessary to be noticed.

Per Curiam.—The judgment is reversed, with costs. Cause
 remanded, &c.

J. C. McIntosh and *B. F. Claypool*, for the appellant.

N. Trusler, *G. Trusler* and *J. W. Wilson*, for the appellee.

BEAL v. BENHAM.

Wednesday,
 February 5.

APPEAL from the *Miami* Circuit Court.

Per Curiam.—We think, on the facts of this case, a new
 trial ought to have been granted.

The judgment is reversed, with costs. Cause remanded,
 with instructions to grant a new trial.

J. A. Beal and *J. M. Brown*, for the appellant.

W. S. Benham, *N. O. Ross* and *R. P. Effinger*, for the
 appellee.

BEAL v. RAY and Another.

17b 554
 150 425

On *September* 28, 1861, *A.*, who was the judge of the Court of Common
 Pleas for the 12th District of the State of *Indiana*, vacated said office, and
 on *September* 30, the vacation of said office became constructively known
 to the public, through the appointment of *B.* by the Executive of the
 State, as the successor in said office, and the entering of *B.* upon the
 duties of said office. On *Tuesday*, *October* 8, the general annual election
 for the State took place, and at such election votes were cast for *B.* and *C.*,

as follows, viz., for *B.* 3,799 votes, and for *C.* 4,189 votes. Suit by *B.* Nov. Term, 1861.
against *C.* and the Governor of the State, to enjoin the latter from issuing a commission to *C.* and the former from acting as judge of said Court.

Held, that the first section of the act regulating general elections, &c., (1 R. S. 1852, p. 260,) which provides that existing vacancies in office shall be filled at the annual general election, is so limited by the second section of said act, which prescribes the notice to be given of a general election, that an election to fill a vacancy can not legally be held where the vacancy did not occur long enough before the day of election to enable the steps required by the statute, as to notice, &c., to be taken.

Held, also, that the courts could not aid by *mandamus* an officer illegally elected to get possession of the office to which he claims to be elected.

Held, also, that a case was not made entitling *B.* to a remedy by injunction to restrain the Executive from issuing a commission to *C.*

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v.
RAY.

APPEAL from the *Marion* Circuit Court.

Wednesday,
February 5.

PERKINS, J. — Complaint for an injunction. Injunction granted. The facts of the case we assume to be these: On *September* 28, 1861, the Hon. *John Coburn* vacated the office of judge of the Court of Common Pleas for the 1:th District of the State of *Indiana*, said district being composed of the counties of *Marion*, *Henricks* and *Boone*. On *September* 30, 1861, the vacation of said office by Judge *Coburn* became constructively known to the public, through the appointment, by the Executive of the State, of his successor, *Charles A. Ray*, Esq., and the entering, by said appointee, upon the duties of the office. On *Tuesday*, *October* 8, 1861, the general annual election for the State of *Indiana* took place; and, at said election votes were cast for *Charles A. Ray* and *John A. Beal*, as candidates for the office of judge of the Court of Common Pleas in and for said district, as follows, viz., for *Charles A. Ray* 3,799 votes, and for *John A. Beal* 4,189, making, in all of the votes cast, 7,988. The number of votes cast in *Marion*, one of the counties of said district, at the presidential election of 1860, was 9,956; so that, for aught that appears, the votes cast at this judicial election, may have been confined to *Marion* county. Were such the fact, the election, under the circumstances in the case at bar, according to *Marshall v. Kerns*, 2 Swan's (Tenn.) Rep. 70, would have been void for that reason. After the result of the election of *October* 8

Nov Term, 1861. **BEAL** v. **RAY.** was known, Mr. *Ray*, being the incumbent of the judgeship in question, by appointment, and holding the election of *October* 8, 1861, void, commenced a suit in the *Marion* Circuit Court against Gov. *Morton* and Mr. *Beal*, to enjoin the former from commissioning the latter, and the latter from acting, as judge. The Circuit Court granted a perpetual injunction.

Two questions are presented to this Court.

1. Was the judicial election involved in this case legal?
2. Has the proper remedy been adopted, supposing the election to have been illegal?

The Constitution of *Indiana* ordains, that all general elections shall be held on the second *Tuesday* in *October*; Art. 2, § 14; but it does not require that vacancies in office shall be filled at such elections.

Whether any, and if any, what vacancies shall be filled at such elections, depends upon statute. This fact puts out of the case, as an authority, that of *The People v. Cowles*, 3 Kernan, (N. Y.) 350.

Our statute, with its title, upon the subject is as follows:

"AN ACT regulating General Elections, and prescribing the duties of officers in relation thereto. [Approved June 7, 1852.]

"SECTION I. *Be it enacted by the General Assembly of the State of Indiana*, A general election shall be held annually on the second *Tuesday* in *October*, at which all existing vacancies in office, and all offices, the terms of which will expire before the next general election thereafter shall be filled unless otherwise provided by law: *Provided*, the first election for members in Congress shall take place at the general election in *October*, 1852, and every second year thereafter.

"SEC. II. The clerk of the Circuit Court shall, at least twenty days before such election, certify to the sheriff of his county, what officers are to be elected; and such sheriff shall give fifteen days' notice thereof, by posting up at all usual places of holding such elections, a copy of such certificate and by publication thereof in some newspaper of his county if any there be, and by delivering a copy thereof to the

clerk of each township within the county, if there be any in such township, who shall notify the trustees of such township thereof." 1 R. S., chap. 31, Statutes, by Gavin & Hord, vol. 1, p. 306.

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v.
RAY.

The question then, whether the judicial election held on *October 8*, last, was authorized by law or not, depends upon the meaning of the above copied statute.

The first section, taken by itself, authorized the election; but the first section was not all of the statute. There were subsequent sections which, in ascertaining the meaning of the statute, were to be considered and reconciled with the first; or, if that could not be done, to be allowed to modify or repeal it, so far as repugnant.

The first section authorized, generally, vacancies to be filled; but the second, and a later section, required that before "such elections," as authorized in first section, shall take place, the clerk should certify, &c., twenty days, and the sheriff should notify fifteen days, &c. Now, this section is just as obligatory, just as much law, as the first section; and so limits the first as to preclude elections under it to fill vacancies where the vacancies do not occur long enough before the day of election to enable the steps required by the statute to be taken. This must have been the intention of the Legislature, and is the legal interpretation and construction, the meaning, in short, of the law, as a whole.

Public policy may require that officers shall not have it in their power, by neglect of duty, to defeat elections.

We do not therefore intimate that where the vacancy had occurred such length of time before the election, the failure of the officers to certify and notify would vitiate an election held. Such then, as above interpreted, we deem to be the statute itself on this subject. And that this construction is in accordance with public policy, and the rights and interests of the people, there can be no doubt.

It secures to them time to examine the qualifications of volunteer candidates, to bring out others of their own volition, if desirable, and to ascertain precisely what the voters have to do, and to secure some concert of movement, some concentration of public opinion and action, so as to prevent

Nov. Term, 1861. a few persons near the public offices from imposing officers, for long periods, upon the people.

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This, in popular governments, is a matter of the utmost importance. See *Biddle v. Willard*, 10 Ind. 62; *Carson v. McPhetridge*, 15 *id.* 327.

It remains to consider the question of the remedy.

It is contended that proceedings for an injunction to arrest the progress of one claiming to have been elected to an office, while taking the steps necessary to possess himself of the office, can not be upheld; that the officer must be permitted to enter into the office, must, indeed, be aided by the courts in getting into it, and then be ousted again by the courts, if he is not rightfully in, by information in the nature of *quo warranto*. The case of *Brower v. O'Brien*, 2 Ind. 423, to some extent favors this position; and such is the common law. See 3 Blacks. Comm., Shars. Ed., note to p. 265. But the case of *Collins v. The State*, 8 Ind. 344, which is approved in *Gulick v. New*, 14 Ind. 93, is inconsistent with the proposition stated, and inaugurates a different practice, to this extent, that the courts will not aid, by mandamus, an officer illegally elected to get possession of the office to which he claims to be elected. In this case, had the Governor refused to commission Mr. *Beal*, the Court, being satisfied of the illegality of his election, would have refused a mandamus if it followed the above cited case. To this extent the new practice may be reasonable; but the granting of an injunction to restrain the Executive is a different thing, and we do not think the principles or practice of the law will justify it, unless in some special case that might be made. Here, no irreparable injury calls for the interposition by injunction. Mr. *Beal* would be a *de facto* judge. The public would not suffer from his acts. The salary is not large enough to put very great pecuniary interests at stake, while the proper legal remedy by information, in the nature of *quo warranto*, might be pending. Indeed, it is not alleged that the Governor threatens to commission Mr. *Beal*. See *Markle v. Wright*, 13 Ind. 548.

We come, then, to the conclusion that a case is not made entitling the plaintiff to the remedy he has adopted; and,

hence, we might have avoided expressing an opinion on the question of the legality of the election, the main question between the parties; but we thought the public interest might be served, and litigation be prevented, by following the precedent set by the Supreme Court of the *United States*, in *Marbury v. Madison*, 1 Cranch's Rep. p. 137, and we have done so.

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1861.

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V.
HUBBELL.

Per Curiam.—The judgment is reversed, with costs. Cause remanded, &c.

J. L. Ketcham, J. E. McDonald, R. L. Walpole and J. Caven, for the appellants.

J. Morrison, J. D. Howland, H. C. Newcomb and T. A. Hendricks, for the appellee.

ALLISON, PRESIDENT OF THE BANK OF GOSPORT v. HUBBELL.

17	559
170	315

Suit against the *Bank of Gosport*, a free bank organized under the law of 1855, upon a bill of exchange drawn by "*A. B.*, Pres.," and alleged to be the bill of said bank, of which the said *A. B.* was then and there president. The bill was indorsed by the drawee in blank, and also contained a subsequent special indorsement, which had been erased. Answer, in denial, with an agreement that all matters of defense might be given in evidence under it.

Held, that § 18 of the free bank law of 1855, (Acts 1855, p. 23,) which requires that the place where a bank is located, if not a county seat, shall contain not less than one thousand inhabitants, is probably merely directory, but if not, the defendant was not, in this case, in a position to make such a defense.

Held, also, that while it is the province and duty of the Court to construe statutes and interpret the language employed by the law makers, yet the object to be arrived at is the intention of such law makers; which must be derived, if possible, from the act itself, or, from that when considered in connection with other statutes upon the same subject; or, from those things together with cotemporaneous construction of, or usage under, said statute.

Held, also, that in carrying on the ordinary, or daily, business of banking, under said free banking law, such as drawing, indorsing, and accepting

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1861.

ALLISON
v.
HUBBELL.

bills of exchange, giving certificates of deposit, &c., either the president or cashier is authorized to bind the institution, in the absence of any specified manner of transacting said business in the articles of association. *Held*, also, that under the agreement to admit all defenses under the general denial, the assignment of the bill to the plaintiff was not admitted by the failure to deny it under oath.

Held, also, that a statement made voluntarily by a witness, and received over the objections, if properly presented, of the party who introduced the witness, in reference to matters which the opposite party could not, and the party introducing him did not, call out, should not be considered as legitimate evidence merely because it was given on the principal examination.

Held, also, that the evidence of the cashier that the drawing of the bill was a transaction not known to the books of the bank, was not sufficient to relieve the bank from the presumption arising from the face of the bill that it was the bill of the bank, as the president might have received the proceeds for the use of the bank and failed to pay them over.

Held, also, that as the blank indorsement of the payee of the bill was followed by a special indorsement to a person other than the plaintiff, and as this last indorsement, though erased, was necessary to support the protest, which was recited to have been made at the request of the last indorser, the possession of the bill after maturity by the plaintiff, he not being known in the chain of title before that time, nor as a holder, did not raise any presumption that he had acquired title before it became due.

Wednesday,
February 5.

APPEAL from the *Owen* Circuit Court.

HANNA, J.—*Hubbell*, assignee, sued *Allison*, representing the *Bank of Gosport*, on a bill of exchange, which, as given in evidence, was as follows:

“GOSPORT, INDIANA, *June* 19, 1858.

“Thirty-five days after date, pay to the order of *F. M. Jennings*, Esq., two thousand dollars.

“W. D. ALEXANDER, *Pres.*

“To D. K. COLBURN, Esq., 25 *William St.*, *New York.*”

Indorsed “*F. M. Jennings*,” and also an erased indorsement as follows: “Pay *G. I. Surrey*, Esq., Cash., or order, *P. V. Rogers*, Cash.,” also an acceptance thereon by said *Colburn*.

It is averred in the complaint that said *Alexander* was the president of said bank, and said bill of exchange the bill of said bank; that it was drawn and delivered to said *Jennings*, accepted by said *Colburn* and others, and then indorsed and delivered to the said plaintiff; that it was not

paid at maturity, but was protested, &c., and notice given to said bank, &c.

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Answer, in denial, and an agreement of counsel filed that defendant might "give in evidence all matters of defense which might be proved under said denial, or under any other proper answer that might be pleaded herein; and that the plaintiff may give in evidence any matters proper to support the complaint or rebut the defense of the defendant which would be admissible under any proper reply."

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The protest given in evidence shows it was made at the request of the *Metropolitan Bank*, and notices mailed to the *Bank of Gosport*, to *P. V. Rogers, Cash., Utica, N. Y.*, and to *Jennings*.

Trial by the Court, finding, and judgment for the plaintiff for the amount of the bill, &c.

It is insisted that this judgment should be reversed because:

1. The village of *Gosport* had not one thousand inhabitants, nor was it a county seat.

2. The instrument sued upon was not the bill of the bank.

3. It was drawn by *Alexander* for the accommodation of *Colburn*; that the bank received no consideration therefor, and the plaintiff became the holder thereof after maturity.

The *Bank of Gosport* was organized under the general banking law of 1855, the second clause of the eighteenth section of which requires that the certificate, to be signed by the persons who may propose to associate, &c., shall designate the place where said bank is to be located, which, if not a county seat, shall contain not less than one thousand inhabitants. The certificate mentioned must designate the name, the location, the amount of capital stock, the names, &c., of the stockholders, and the time at which such association shall commence and terminate, and is to be acknowledged and recorded in the clerk's office and office of the Secretary of State. This certificate is declared to be *prima facie* evidence of the facts therein contained, and may be used as evidence for or against such association.

1. On the trial there was evidence tending to show that

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Gosport had not at any time one thousand inhabitants; and, therefore, it is argued that the whole acts of said corporation were void.

We are rather of the opinion that the statute is merely directory to the governor, secretary and treasurer of State in their deliberations as to whether persons applying under said law had complied with the provisions thereof; §2; but whether it is strictly so or not need not be decided in this case, for the defendant here does not stand in a condition to set up this defense. The question might arise in an application by the State to reclaim the franchises of the bank; and its effect would depend then, perhaps, upon how far the provision should be regarded as merely directory.

2. The twenty-third section of the act contains this clause: "Contracts made by such association, and all bills and notes by them issued and put in circulation as money, shall be signed by the president or vice-president, and cashier thereof." This provision is borrowed from the banking law of *New York*; or, at least, is identical in language with their statute, under which litigation has been had and decisions made. *Sandford v. Wycoff*, 4 Hill, 444; *Barnes v. Ontario Bank, &c.*, 19 N. Y. 152. The former decision, made in 1842, was dissented from by some of the ablest lawyers then members of said Court, but the conclusion of the majority controlled up to the latter decision in 1859, when the conclusion of the former Court was confirmed, or rather adhered to; to the effect, in that latter case, that a certificate of deposit signed by the cashier alone was binding upon the bank.

The difficulty in the interpretation of the statute arises out of the meaning which should be given to the word contracts as therein used, more than from any difference of opinion as to powers of agents or officers of corporations in instances where their duties are well defined by the charter or act of incorporation. See Angell and Ames on Corp., §291. This authority lays down the doctrine that where the charter, &c. prescribes the mode of contracting, that mode must be observed, or the instrument no more creates a contract than if the body had never been incorporated.

Without doubt, drawing, &c. a bill of exchange, is an act which should be included within the operation of the statute, if the word "contract" is to receive its most extended signification. Indeed, it may be conceded that the Legislature intended to provide for all transactions properly embraced in the term "contracts," unless there is something in the act itself giving it a more limited signification. It is manifest that notes or bills of the bank, intended to circulate as money, promising to pay the bearer, would be included in the said term, "contracts," without being specially named, after the use of said word. If the said word was intended to have its most extended signification, why were "notes," &c. specially designated as being subject to the same mode of execution as they would have been under such general interpretation of the meaning of the term immediately preceding, if they had not been so named? If, in this statute, the words, "and all bills and notes by them issued and put in circulation as money," had been omitted, it appears to us, the intention of the Legislature would have been more readily arrived at, in this, that the word "contracts" would then have been construed in such manner as to give force and effect to its usual legal meaning: that is, if there had been, under such circumstances, any room for interpretation. But by the insertion, in the statute, of the language just quoted, doubt, to say the least, is thrown over the intention of the framers thereof, as to the particular class of contracts which they were desiring to guard by the signatures of named agents; for the rule of construction that requires a statute to be so expounded as, if practicable, to give effect to every part of it, *Com. v. Duane*, 1 Binn. 601; *Com. v. Alger*, 7 Cush. 53, 89, would be entirely disregarded by, in effect, treating the language just quoted as in fact having no force, or conveying no meaning. Such, it appears to us, would be the result of a construction of this section giving to the word "contracts" the meaning which, perhaps, should attach in the absence of any thing limiting or explaining it.

Although it is the province and duty of the Court to construe a statute, and interpret the language employed by the law makers, yet the object to be arrived at is a question

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of fact, namely, the intention of such law makers. That is to be derived, if possible, from the act itself; or from that, when considered in connection with other statutes upon the same subject, or from these things, together with cotemporaneous construction of, or usage under, said statute. All the Courts can do is to give effect to the will of the law makers, when clearly expressed, or thus ascertained, when clothed in doubtful language, or terms of ambiguous meaning.

We are of opinion that the connection in which the word "contracts" occurs, in said section, excludes any presumption that might otherwise have arisen as to its including certain contracts that it was contemplated such associations might enter into. The trouble then arises, to determine the particular contracts that should be excluded, and those that should be included within the act. We are strengthened in this conclusion by reference to the cotemporaneous construction of the same, by those who have operated under it—whatever weight, although it may be slight, the same should have; and also by the usage that has prevailed in the particular application thereof. Both the construction and usage referred to have, in the absence of express provisions in the articles of association, recognized the right of either the president or cashier, usually the latter, to represent the association by his signature alone, in the usual and ordinary business of such institutions. We are not aware of any legal construction having been placed upon the said statute, in this State. That of the State of *New York*, we have already adverted to. Under these circumstances we are, therefore, of opinion, that in carrying on the ordinary—that which may be termed daily—business of banking, such as drawing, indorsing and accepting bills of exchange, giving certificates of deposit, &c., either the president or cashier is authorized to bind the institution, in the absence of any specified manner of transacting said business, provided for in the articles of association, under the twentieth section of said act. In this instance the articles of association contained nothing upon that point. It is not necessary for us in this case to designate the particular contracts, or class of contracts, that should receive the signature of the president and cashier

both. We only decide that this bill of exchange, as to that point, is binding on the bank, although having attached to it the signature of the president only.

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3. It is treated, in appellee's brief, as a conceded point, that if the bill was executed without consideration, by the bank, and received by the plaintiff after it was over due, that the facts can be inquired into, &c.; but it is insisted that the evidence does not show that it was without consideration, nor that plaintiff received it after maturity.

The averment in the complaint would appear to place the indorsement to plaintiff at the time of the execution of the bill. This was denied, but not under oath, and, therefore, it is contended, was admitted, even if it had been necessary to plead under oath. 11 Ind. 148. The fact appears to have been forgotten that there was an agreement that proof might be made as to any fact that could be properly pleaded. It will not be contended but that a plea, or answer, might have been placed on the record, putting in issue said averment of the assignment. We think, therefore, under this agreement, the averment was not admitted by such answer not being filed.

The proof upon this point was partly furnished by the plaintiff. One *Sabin* testified to the presentation, by him, of said bill to the acting cashier of said bank, who refused to have anything to do with it, on the ground that the books of the bank did not show any transaction of the kind. The said cashier was afterward introduced by the defendant, and testified to the same facts, and that he was acting as cashier at the time said bill purported to have been drawn, and that the transaction was not known on the books of the bank. *Sabin* stated further, that he presented the bill to *Alexander*, the president of said bank, who told him that the bank had nothing to do with it; that it was an accommodation paper he had drawn for *Colburn* in *New York*, and that *Colburn* had given him a written obligation to protect it and take it up; that he showed to him *Colburn's* obligation in the same handwriting of the acceptance of the bill. The testimony in reference to *Alexander's* declarations and *Colburn's* obligation was objected to by the plaintiff, and its admission excepted

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to. It is now stated in argument that the defendant called it out upon cross-examination, although the record does not show that *Sabin* was cross-examined at all by said defendant.

We suppose that a statement, made voluntarily by a witness, and received over the objections, if properly presented, of the party who introduced such witness, in reference to matters which the opposite party could not, and the party introducing him did not, call out, should not be considered as legitimate evidence, merely because it was given upon the principal examination. This conclusion would leave the question to be considered, whether the declarations of *Alexander*, if thus made, were competent evidence upon the question of the original consideration of the bill.

The declarations and admissions of an agent are often received to bind his principal, (Story on Agency, § § 134-141,) that is, to charge him. But the question here is, how far they should be received to discharge such principal? This is a material inquiry, because, from the face of the bill, the presumption would be that it was the bill of the bank, and for its benefit. The evidence of the cashier, that it was a transaction not known on the books of the bank, is not sufficient to relieve that institution from the result of such presumption; for the president may have received the proceeds of the bill for the use of said bank, but failed to pay the same into its coffers: and yet the liability would attach for his act. The bill of exceptions is so framed as to fail to inform us at what time objection was interposed to the statements of *Sabin*, as to the declarations of *Alexander*. *Sabin* was the witness of the plaintiff, and, so far as we can see, a part at least of the statements of *Alexander* were called out by the said plaintiff. We are not informed but that the whole declaration was received as a continuous conversation, and afterward objected to. As the plaintiff could legally call out such declarations, and the ruling of the Court was against rejecting them, we must presume in favor of that ruling, that a sufficient reason existed for the same, until the contrary is made to appear.

It has been already stated that certain facts appeared from the protest of the notary, which was given in evidence by

the plaintiff. Neither from the indorsements on the bill, nor from any thing in the protest, made at the time it matured, nor from any evidence other than said bill, does it appear that the plaintiff was interested in it, up to the time of said protest. *Jennings'* indorsement was in blank, that is, not filled up; nor was there any proof when the plaintiff acquired an interest in, or obtained possession of, the bill. So far as the indorsements showed, the title passed from *Jennings* to *Rogers*, the cashier of some bank, and from him to the cashier of the *Metropolitan* Bank. The notices were regulated by this appearance. It is now argued and insisted that the bill passed directly from *Jennings* to the plaintiff, who passed it by mere delivery for collection, and that upon its non-payment it was returned to him. This theory is all very well, if we had any evidence of facts to sustain it. As before stated, there is none whatever. There is a presumption arising from his possession, after maturity, for *Sabin* testified that he received it from the plaintiff, through another person, for collection. Where the facts existing raise a presumption of a transfer, it would be that it was before the bill became due. Byles on Bills, 131, n.

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In the case at bar the plaintiff showed, by his own evidence, that, at maturity, the bill was at least controlled, if not owned, by the *Metropolitan* Bank, and having shown, *prima facie*, a regular chain of title, by indorsements, from the payee to said bank, without any evidence that it passed through his hands, we are not able to perceive where a presumption should rest, in favor of the acquisition of title by the plaintiff, sufficient to overcome the *prima facie* case thus made out. It is true that the appellee insists that he did not plead, nor should the Court consider, the erased indorsements on the bill. But without these indorsements, there is nothing showing by what authority the *Metropolitan* Bank caused the protest of said bill to be made, and notices given. That protest has to be relied on to make out the case, to sustain the allegation that the bill had been protested for non-payment, &c. As the said indorsements appear to have been given in evidence for that purpose, they should be considered in reference to the point now under discussion.

Nov. Term, 1861. We are of opinion that, under these circumstances, the possession of the bill, after maturity, by one not known in the chain of title before that time, nor as a holder, does not raise any presumption that he had acquired title before it became due; but to the reverse, excludes a mere presumption of that character.

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Per Curiam.—The judgment is reversed, with costs. Cause remanded, &c.

W. M. Franklin, for the appellant.

E. Dumont and O. B. Torbet, for appellee.

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ROWE and Others.

A Circuit judge having been of counsel in a cause pending in his Court, set the same for trial before a judge of the Supreme Court, who appeared at the time designated, being in regular term time, heard some arguments and made some orders therein as to making new parties, &c. The Supreme judge not having appeared further in said cause, the same was again set for trial by the judge of the Circuit Court, before a judge of another circuit. This was done by agreement of the parties, entered of record. The cause was accordingly heard before the judge last designated, who, after repeated adjournments, from time to time, and not within any regular term of said Court, decided the same, and rendered judgment for plaintiff, over a motion for a new trial by defendants.

Held, that the judgment thus rendered was valid and binding; that said judge last designated had full power under the act of March 1, 1855, (Acts 1855, p. 61,) to adjourn the hearing of said cause from time to time, although some of said adjournments might have been to a day beyond a regular term of said court.

Held, also, that an order of the Circuit Court continuing said cause to another term, while the same was pending before the judge designated to try the same, was without authority.

Thursday,
February 6.

APPEAL from the *Delaware* Circuit Court.

HANNA, J.—Suit upon bonds, and coupons thereto attached, issued by the railroad company, and to foreclose a mortgage

on lands given to secure the payment of the same. Judge- Nov. Term,
ment for the plaintiffs. 1861.

The pleadings were such as to raise questions upon the power of the company to receive, in payment of stock subscriptions, the real estate mortgaged, and to so mortgage it for the security of the payment of said bonds running from five to ten years; and also questions as to the validity of said bonds sued on. The company had its office at *Muncie, Delaware county, Indiana*, from which the bonds were issued, payable to *Thomas J. Sample*, a resident of said State, at the office of the *Ohio Life Insurance & Trust Co.*, in *New York*, with ten per cent. interest, payable semi-annually, at said office of said Trust company.

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The plaintiffs aver that said bonds were sold in the State of *Ohio*, the laws of which allow the taking of interest at the rate of ten per cent.

There was a general denial, and also a paragraph of the answer averring that the bonds were executed in *Indiana*, and that they were delivered to *De Graff & Co.*, for work done on said road in *Indiana*, and not otherwise negotiated, &c. A demurrer was sustained to this paragraph. The Court found that the bonds were issued, made and signed in *Indiana*, taken to *New York*, and offered for sale, but not sold, returned to, and sold at the city of *Cincinnati, Ohio*, to *De Graff & Co.*, in payment for work done on the road in *Indiana*.

But it is insisted that there was no valid judgment rendered, because it was not so rendered at any regular or adjourned special term of said Court, nor by a person authorized to render the same.

The facts are, that the action was commenced while Judge *Anthony* was on the bench, and continued two or three terms, until Judge *Buckles* came on the bench, who having been interested as counsel in the case, refused to preside on the trial thereof, and set the same down for trial before Judge *Perkins* of the Supreme Court, who appeared and heard an argument on demurrer in the case at the regular *November* term, 1859, of said Circuit Court, and made several orders in reference to admitting new parties, and permitting them to

NEW TERM, answer, &c. The record then shows that, "by agreement of
1861. the parties (the judge of the Court being interested as counsel,) this cause is set for the fourth *Monday of December*
CINCINNATI 1859, for the trial thereof, and that Judge *Fabius M. Finch*,
AND CHICAGO judge of the fifth circuit, is appointed to hear, and finally
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ROWE. determine said cause at said term specified."

The record then shows that at the next regular *May* term of said *Delaware* Circuit Court, said cause was continued. Then follows entries, orders, &c. made by said Judge *Finch*. Commencing on said fourth *Monday of December*, 1859, at a court by him held, pursuant to said appointment; and afterward, by agreement of parties, it appears said cause was continued until *January 9*, 1860, when the said judge and parties again appeared, and further orders, &c., were made, and the cause continued until the fourteenth day of said month, when the parties, &c. again appeared, &c., and the cause was again continued until the twenty-third day of said month. On the twenty-fourth day of said month, as appears by the said record, "the Court met pursuant to adjournment, present as before." The parties again appeared, &c., and by agreement, said cause was set down for *June 10*. On that day the parties appeared, and submitted the cause for trial to the Court, without a jury. After hearing the proofs, arguments, &c., "day is given the parties until the third day of *January*, 1861, to hear," &c., until which time said cause was continued. At the next named date the parties appeared, and there was a finding and judgment. Motion for a new trial overruled, and thirty days given to file bill of exceptions, which was filed within the time limited. There is a motion here to strike out the bill of exceptions.

It is objected that the case having passed from before Judge *Bucklea*, is in a manner, assimilated to a change of venue, to be heard before Judge *Perkins*, that it must of necessity take its course before the latter judge; that he could not appoint another judge, nor could the case again be placed in a condition to enable the incumbent of the Circuit bench to designate some other judge to preside at the trial thereof. But if the defendant is mistaken in this, then the person last designated, Judge *Finch*, should have tried

and concluded the case at the term set down, or, failing to do so, should have continued it until the next regular term, and not from time to time for more than a year, as disclosed by the record.

These proceedings were had under the act of *March 1, 1855*, (Acts 1855, p. 61,) by which it is evident the Legislature designed to substitute a method of obtaining the trial of cases, in which the judge of the court where pending could not preside, without the necessity of a resort to a change of venue to some other court. It was contemplated that the case should still remain upon the docket of the same court, but some other qualified person should be called upon by the disqualified judge to preside at such trial, either during term or at a time to be fixed in vacation. In the case at bar Judge *Perkins* began to hear the case during a regular term, but failing, for some reason not disclosed by the record, to complete the same, or continue it to a future time for further hearing, we are of opinion it was, still under the control of the regular judge, at least so far as to permit another order of appointment, &c. Certainly it was, with the consent of parties. A time having been set down for the hearing of said case and a judge designated, we are of opinion the statute expressly conferred upon him the power to adjourn from time to time until the business was completed; notwithstanding some one of such adjournments might have been to a day beyond a regular term of said court. Under this view of the case the order made by Judge *Finch* to adjourn the hearing beyond the *May* term, 1860, of said Court was operative, and consequently, that made by the Court at the said term continuing the case until the next term was without authority, for the reason that the case was still pending before Judge *Finch*, and was not on the docket among the cases to be tried at that term.

The other questions presented in this case are passed upon in that of *Butler v. Myer*, *ante*, p. 77.

Per Curiam.—Judgment affirmed.

T. J. Samp'e, *C. B. Smith*, and *W. J. Smith*, for the appellant.

J. L. Ketcham and *J. Smith*, for the appellees.

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The act of *June 4, 1861*, (Acts Spec. Sess. 1861, p. 79,) providing for the redemption of real property sold upon execution, &c, so far as the same was intended to apply to sales on judgments rendered upon contracts existing at and before its passage, is in conflict with Art. 1, § 10 of the Constitution of the *United States*, which prohibits the passage of any law impairing the obligation of contracts.

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Thursday,
February 6.

APPEAL from the *Decatur* Circuit Court.

PERKINS, J.—The only question in this case is whether the redemption law of 1861, (Acts 1861, p. 79,) is to be held applicable to sales on judgments upon contracts existing at and before its passage. The act provides that in all cases of sales by the sheriff, &c., on execution, &c., after its passage, the sheriff shall not give the purchaser a deed for, and possession of, the property sold, but only a certificate entitling him to a deed and possession in one year from the sale, if the property is not redeemed.

In legal effect, what is the operation of this statute? It is to prohibit, for one year, the absolute sale of property for the purpose of collecting a debt due. In place of such sale, it authorizes the sheriff to make a contract for the absolute sale of property after the lapse of one year's time, unless such contract shall be defeated by the performance of a specified condition, namely, the return of the purchase money paid, with interest, by the expiration of said year; it authorizes, in other words, the sheriff, in legal effect, to mortgage the debtor's land for one year, to any one who will advance the amount required by law, upon its appraised value, the mortgage to become absolute, and free from an equity of redemption, at the end of a year, if the money advanced is not repaid with interest.

What is the influence of such a statute upon the collection of debts? Its tendency is to delay. It embarrasses the collection, because it deprives the creditor of the right which the law, at the date of his contract, gave him of selling the absolute fee of the debtor's real estate.

And the question is, if held to operate upon existing

contracts, will the act conflict with that clause of § 10, Art. 1 of the Constitution of the *United States*, which declares that no State shall pass any law impairing the obligation of contracts? What constitutes such a law?

A few years ago, the Legislature passed a law prohibiting the sheriff to sell the debtor's property unless the half of the appraised value was bid for it. Before that time, property had sold for what it would bring. The appraisement law was held not to operate on existing contracts; and why? Not because it forbade the sale of property for their enforcement; it did not do that; but because it deprived the sheriff of the absolute power to sell the fee at all events; it left him but the conditional power to sell; the power of selling if he could get a certain price, not otherwise. It tended to embarrass, and thereby to prevent the sale, and thus delay the collection of the debt. So, too, awhile ago, an additional stay of execution was given upon judgments, by an act of the Legislature. This act was held inoperative as to existing contracts; and why? Not because it canceled obligations, but because it delayed their collection by the process of the law. This was the natural, necessary, and intended effect of both of the above mentioned statutes, and it is, also, of the redemption law. If the decisions upon the operation of the first two named laws were right, and we are bound by them, then, beyond doubt, the redemption law, in question, must be held inoperative upon existing contracts. See the cases collected in Gavin & Hord's Ed. of R. S., Vol. 1, p. 10.

It is said, that where a purchaser bids off the property and pays the money under the present law, he has no right to object to the redemption, as he buys in face of the law; but it is a maxim, that every man is bound to know the law, and act accordingly. Hence, the man who buys does so knowing that the law will not, and can not, operate to deprive him of his deed and title; and he must be taken to make his bid in the light of, and influenced by, such knowledge. And, further, the law must be uniform in its operation, alike upon all.

Again, it is urged that the Legislature has a right to change legal remedies; that it is only the obligation of contracts

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Nov. Term, 1861. that can not be impaired; and it is claimed that the redemption law affects the remedy only.

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It is freely admitted that the State, for convenience, may change legal remedies; may vary the times of holding courts, shift jurisdiction from one to another, change forms of action, of pleadings and of process, &c.; and that such legislation may, incidentally, delay, somewhat, the collection of given debts; but such is not the purpose of this legislation, and while its validity is admitted, it may also be asserted, that the Legislature can not, under the guise of legislating upon the remedy, intentionally, in effect, impair the obligation of contracts; and it may be further laid down, that any legislation, professedly directed to the remedy, which deprives a party of one substantially as efficient as that existing at the making of the contract, does impair the obligation of the contract. Ind. Dig., § 55, p. 271. In *Gantly's Lessee v. Ewing*, 3 How. (U. S.) 707, Judge Catron, in delivering the opinion of the Court said: "This Court held in *Bronson v. Kinzie*, 1 How. 319, that the right, and a remedy substantially in accordance with the right, were equally parts of the contract, secured by the laws of the State where it was made." See, also, 1 Blackf. by Peele & Davis, p. 220, note. Also, 4 Cal. Rep. 127; 5 *id.* 401; 1 Manning (Mich.) Rep. 309. It may, perhaps, be questioned whether the redemption law in question is properly classed as legislation touching the remedy. It does not operate upon terms of court, upon pleading or practice in obtaining judgment, nor upon process upon judgment. But however classed, it restricts, curtails the right of the judgment creditor, in relation to subjecting the property of the debtor to execution for the payment of given debts. It may not diminish the fund of the debtor applicable to the payment of his debts; nor did the appraisal law, nor the stay law; but it limits, curtails materially, and embarrasses the right of the creditor, in given cases, in subjecting the entire amount of the debtor's property subject to execution to the payment of the debt in suit. *Curran v. Arkansas*, 15 How. (U. S.) 304.

This Court judicially knows, and it must decide, the question, as one of law, upon its judicial knowledge, that the

right to sell, at once, the entire, absolute fee simple in land, and give the purchaser possession, is worth more, will be more likely to realize the amount of money due on a particular judgment, than the restricted right of selling a conditional interest in such land; and that, hence, the taking away of such absolute right may tend to defeat, in given cases, the collection of debts due. A purchaser will give more for an absolute title than a conditional one; and few moneyed men will be found to buy conditional titles as mere investments, which may be defeated by simply refunding them their money with ten per cent., when a much higher rate may be obtained on the most select securities. But suppose the act in question is to be regarded as directed to the remedy; still, as we have seen, an act thus directed may impair the obligation of contracts. It is very doubtful whether those cases decided upon the general rule of international law, that the *lex loci* governs as to the interpretation and effect to be given to the terms of a contract, and the *lex fori* as to the remedy upon it, are safe guides to rely upon in determining the force to be awarded to the constitutional provision quoted. These express constitutional restrictions upon the legislative power are peculiar to American government, and must be interpreted in accordance with the spirit and purpose of their adoption. Stay and relief laws, enacted by various States before the adoption of the Federal Constitution, were, in part, at least, the evil which it was designed to prevent the repetition of. The learned Chancellor *Desaussure*, of *North Carolina*, who lived in the times mentioned, and who went upon the Equity Bench in 1808, in a note to *Glaze v. Drayton*, vol. 1, p. 109, of his Reports, (a case decided in 1784,) says: "The Legislature, in consideration of the distressed state of the country, after the war, (Revolutionary war,) had passed an act preventing the immediate recovery of debts, and fixing certain periods for the payment of debts far beyond the periods fixed by the contract of the parties. These interferences with private contracts became very common with most of the State Legislatures, even after the distress arising from the war had ceased in a great degree. They produced distrust and

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We have been controlled, in coming to our conclusion, by the decisions bearing upon the question latest made by the Supreme Court of the *United States*. We may most safely, we think, presume that that Court will follow, and not depart from, those decisions. Should such be the case, it would be detrimental to the public should this Court decide the redemption laws operative upon existing contracts, thus leading debtors to suffer their lands to be sold upon the faith of a right to redeem, which the Supreme Court might take away. While, should this Court decide against the redemption, it will put debtors on their guard to take care of their property; and should the Supreme Court afterward decide in favor of redemption, the decision of this Court will not have worked harm to any great extent.

Per Curiam.—The judgment is reversed, with costs. Cause remanded, &c.

DISSENTING OPINION.

HANNA, J.—In the conclusion arrived at by the Court, I can not fully concur, and shall be compelled to occupy some space to give my reasons.

In the tenth section of the first article of the Constitution of the *United States*, it is, among other things, provided that "no State shall pass any law impairing the obligation of contracts." And section twenty-four of the first article of our State Constitution, declares that "no *ex post facto* law, or law impairing the obligation of contracts, shall ever be passed."

The laws of this State, passed at the Special Session of the Legislature in the year 1861, contain an act, approved *June 4, 1861*, the first section of which is as follows:

"That whenever, hereafter, any real property, or any interest therein, shall be sold on any execution, or order of sale, issued upon any judgment, decree, or other judicial proceeding within this State, the owner thereof, his heirs, executors, administrators, or any mortgagee, or judgment creditor having a lien upon the same, may redeem such real property or interest therein, at any time within one year from the date of such sale, by paying to the purchaser, his heirs, or assigns, or the clerk of the court from which such execution or order of sale was issued for the use of such purchaser, his heirs, or assigns, the purchase money, with interest thereon, at the rate of ten per cent. per annum."

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The second section points out the duty of the officer making sale; and provides that the judgment debtor shall be entitled to the possession during said year, and, if not redeemed, shall be liable for rents. The third section gives a mortgagee, or judgment creditor, who shall redeem, a lien for the money so paid.

The question presented for consideration is, whether contracts in existence at the time this law came in force are subject to its provisions, in view of the prohibitions of the Constitution above quoted.

Judicial investigation has been directed to two points arising under this clause of the Constitution of the *United States*; *first*, as to what is a contract within the sense thereof; *second*, as to what interference, or extent of interference, with a contract, should be considered as impairing the obligation thereof.

In the case at bar there need be no time spent upon the first inquiry, as the contract under consideration clearly falls within the sections quoted. But, see *Dartmouth College v. Woodward*, 4 Wheat. 518; *Fletcher v. Peck*, 6 Cranch, 87; *Plant. Bank v. Sharp*, 6 Howard, 301; *The People v. Morris*, 13 Wend. 325; *Terrett v. Taylor*, 9 Cranch, 43; *East Hartford v. Hartford Bridge Co.*, 10 How. 511; *Conner v. The City of New York*, 1 Selden, 285; *The West River Bridge Co. v. Dix*, 6 How. 507; *The Trustees of Vincennes University v. Indiana*, 14 How. 288; *Providence Bank v. Billings*, 4 Peters, 514; *Charles River*

Nov. Term, 1861. *Bridge v. Warren Bridge*, 11 Peters, 548, and authorities cited; *The Richmond Railroad Co. v. The Louisa Railroad Co.*, 13 How. 81; *White v. White*, 5 Barb. 474; *Londonderry v. Chester*, 2 N. H. 268; *Maguire v. Maguire*, 7 Dana, 183; *Green v. Biddle*, 8 Wheat. 1; *New Jersey v. Wilson*, 7 Cranch, 164; *Sturges v. Crowninshield*, 4 Wheat. 122; *Ogden v. Saunders*, 12 *id.* 213; *Mason v. Haile*, *id.* 370; *Fisher v. Lacky*, 6 Blackf. 373; *Bronson v. Kinzie*, 1 How. 311; *McCracken v. Hayward*, 2 *id.* 608; *Curran v. State of Arkansas*, 15 *id.* 318; *Morse v. Goold*, 1 Kernan, 281; *Rockwell v. Hubbell*, 2 Doug. 197; *id.* 38; *Wilson v. Hardesty*, 1 Mar. Ch. 66.

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As to the second inquiry: certainly as long back as the February term, 1819, of the Supreme Court of the *United States*, a distinction was taken between the *obligation* of a contract and the *remedy* given by the Legislature to enforce that obligation. *Sturges v. Crononinshield*, *supra*. And that without impairing the obligation, the remedy might be modified. This view of the clause of the Constitution was sustained in *Mason v. Haile*, 12 Wheat., and *Wilkinson v. Leland*, 2 Peters, and, aside from the case of *Green v. Biddle*, 8 Wheat., which appears to have turned upon the compact between *Virginia* and *Kentucky*, continued to be the rule of construction in reference to this clause of the Constitution until the January term, 1843, of the same Court, when the case of *Bronson v. Kinzie* came up, in which it has been generally understood the Court somewhat modified the ruling by narrowing the limits within which the remedy might be affected by State legislation. But still, this case, and those of *McCracken v. Hayward*, and *Curran v. The State of Arkansas* following it, viewed in connection with those which had preceded them, upon the same point, would appear to indicate the opinion that State legislation on the remedies of prior contracts would be constitutional if such legislation should still leave substantial and efficient means of enforcing them. This view is sustained by several cases decided by State tribunals. *James v. Scull*, 9 Barb. 482; *Bruce v. Schuyler*, 4 Gilm. 221; *Stocking v. Hunt*, 3 Denio, 274; *Howard v. Kentucky, &c. Ins. Co.*, 13 B. Mon. 265.

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I do not propose to discuss the questions, whether this apparent conclusion can be supported by sound reasoning, nor whether the real *obligation* of a contract does not consist of the *remedial* right to coerce performance, existing at the time the contract is entered into, rather than in the naked agreement, promise, or understanding of the parties, or whether the whole right of prescribing the remedy is in the States, severally. Nor do I propose to examine the questions of who should determine whether substantial and efficient means would remain, upon the enactment of a given statute, to enforce the contract, or whether the obligations thereof were materially impaired thereby. But conceding that the conclusion arrived at is binding upon us, I will examine its bearing upon the case at bar, and as affecting the statute under consideration.

By the adoption of the clause of the Constitution of the *United States*, it was assumed that the legislative power of the States possessed the right, unless restrained by fundamental law, to so shape their enactments as to impair the obligations of existing contracts. How far it was agreed they should be prohibited from the exercise of that power, has, as we have seen, been the subject of much diversity of opinion. If the law of the contract, as it is termed, that is, the laws which existed at the time the contract is made, enters into and forms a part of the contract, including the laws giving a remedy on the contract, then, perhaps, the first question would be, under such a construction, should the law of the place where the contract is made, or of the place where its enforcement is attempted, govern, in a case where they are different at its date? The difficulty of this question will be appreciated when we recollect that all laws authorizing original, mesne, or final process—and creating officers to execute, and prescribing their duties in executing the same—creating tribunals to hear and determine suits, prescribing the rules of evidence by which they shall be guided, and otherwise directing their duties, have reference directly, or indirectly to the remedy. It is apparent that if the law of the place when the contract was made, forms a part of the contract, and no State can impair the same as to the remedy,

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it would operate, in effect, as almost an entire surrender of State sovereignty as to legislation upon such contracts, because a debt contracted in a particular State, but payable generally, is, by operation of law, payable everywhere, and may be enforced wherever the debtor, or his property, can be reached.

I am not now discussing the applicability of the law of the place of the contract, in expounding the same, except so far as the law of the remedy, in the place where it is sought to enforce the contract, is involved. As to that point there appears but little conflict. Remedies are to be sought according to the forms and order of judicial proceeding prescribed by the law of the place where the action may be instituted, without having any reference to the place where the right accrued. 2 Kent's Comm., § 27; *Donn v. Lippman*, 5 Clark & Finnell R. 1. In this case Lord Brougham said, that "Whatever relates to the remedy to be enforced, must be determined by the *lex fori*, the law of the country, to the tribunals of which the appeal is made. The parties do not necessarily look to the remedy when they make the contract." As to the application of this general principle of law, in regard to a contract made in one State and attempted to be enforced in another, see *Bank of the United States v. Donnelly*, 8 Peters, 361, in which the Court held this language: "But whatever may be the legislation of a State as to the obligation or remedy on contract, its acts can have no binding authority beyond its own territorial jurisdiction. Whatever authority they have in other States, depends upon principles of international comity, and a sense of justice. The general principles adopted by civilized nations is, that the nature, validity, and interpretation of contracts are to be governed by the law of the country where the contracts are made, or are to be performed. But the remedies are to be governed by the laws of the country where the suit is brought." See, as to same point, *Fenwick v. Sears*, 1 Cranch, 259; *Wilcox v. Hunt*, 13 Peters, 378; *Warren v. Lynch*, 5 Johns. R. 239; *Jones v. Hooks, Administrator*, 2 Rand. Va. R. 303; *Pearsall v. Dwight*, 2 Mass. R. 84; *Hyde v. Goodnow*, 3 Comst. 270; *Ohio Insurance Company v. Edmondson*, 5 Louis. R. 295.

In view of the general principles of international law, and the consideration given in one State to the judicial proceedings of another, the Supreme Court said, in the case of *Sturgis*, in 4 Wheat., that "The distinction between the obligation of a contract, and the remedy given by the Legislature to enforce that obligation, has been taken at the bar, and exists in the nature of things. Without impairing the obligation of the contract, the remedy may certainly be modified, as the wisdom of the nation may direct." This was followed up by the Court, in *Bronson v. Kinzie*, in this language: "Undoubtedly a State may regulate, at pleasure, the modes of proceeding in its courts in relation to past contracts, as well as future. . . . and, although a new remedy may be deemed less convenient than the old one, and may, in some degree, render the recovery of debts more tardy and difficult, yet it will not follow that the law is unconstitutional. Whatever belongs merely to the remedy may be altered according to the will of the State, provided the alteration does not impair the obligation of the contract. But if that effect is produced, it is immaterial whether it is done by acting on the remedy, or directly on the contract itself." In this connection the language used in *Green v. Biddle*, in regard to the compact between *Virginia* and *Kentucky*, is referred to approvingly, and as applicable to contracts, to wit: "It is no answer that the acts of *Kentucky*, now in question, are regulations of the remedy, and not of the right to the lands. If these acts so change the nature and extent of existing remedies as materially to impair the rights and interests of the owner, they are just as much a violation of the compact as if they directly overturned his rights and interests."

Upon a slight examination of these and other cases, they would appear scarcely reconcilable. In *McElmoyle v. Cohen*, 13 Peters, 312, it is said: "But the point might have been shortly dismissed with this safe declaration, that there is no direct constitutional inhibition upon the States, nor any clause in the Constitution, from which it can be even plausibly inferred that the States may not legislate upon the remedy in suits upon the judgments of other States, exclusive of all interference with their merits." Now the *merits*

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would appear, from the decision of the same Court, heretofore quoted, to involve matter affecting the nature, validity, interpretation or discharge of the contract, and not remedies provided for enforcing the obligations thereby incurred. So it has been repeatedly held, that a binding statute may be enacted, and pleaded in bar of a prior contract, shortening the time within which the obligation may be enforced, thereby defeating the action.

Perhaps these decisions can be reconciled upon the language of Lord *Brougham*, in the case heretofore referred to: "When both parties reside in the country where the act is done, they look of course to the law of the country in which they reside. The contract being silent as to the law by which it is to be governed, nothing is more likely than that the *lex loci contractus* should be considered at the time the rule; for the parties would not suppose that the contract might afterward come before the tribunals of a foreign country. But it is otherwise when the remedy actually comes to be enforced. The parties do not, necessarily, look to the remedy when they make the contract. They bind themselves to do what the law they live under requires," &c.

So, in the case of *McCracken v. Haywood*, the Supreme Court say: "The obligation of the contract between the parties, in this case, was to perform the promises and undertakings contained therein; the right of the plaintiff was to damages for the breach thereof, to bring suit, and obtain a judgment, to take out and prosecute an execution against the defendant till the judgment was satisfied, pursuant to the existing laws of *Illinois*. These laws giving these rights were as perfectly binding on the defendant, and as much a part of the contract, as if they had been set forth in its stipulations in the very words of the law relating to judgments and executions."

Thus, it would appear, that as to contracts sought to be enforced in the place where they were entered into, where the parties reside, they are supposed to have looked to the law of the remedy, as well as that of the obligation; but that where they are being enforced in a place, and under laws, different from that of the contract, the remedy

is not supposed to have been looked to in making the contract.

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But even with this view of the cases in our Supreme Court, I can not, with due deference to that august tribunal, believe that it was intended, the very broad language used in the latter part of the quotation above set forth, should receive the interpretation which it would, legitimately, bear, namely, that the contract gives to a party the right to enforce it, upon breach, by suit, take judgment, sue out and prosecute executions, in pursuance of the law existing at the time of the contract; and that no law can be made by the Legislature of the State, changing the mode of proceeding, so as to affect the rights thus entering into the contract.

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If this is the construction, now to obtain, of the clause of the Constitution of the *United States*, it would overturn a long line of decisions, heretofore quoted, by which it appeared to be settled, that legislation affecting the remedy, only, was within the control of the States, severally. It can not be that in *Indiana*, in a suit upon a contract, entered into previous to 1842, we are to be remitted to the barbarous custom of imprisonment for debt. This was a part of the execution which might be sought upon judgments previous to that date; and if the language used in the case in 2 Howard is to receive the broad construction it would warrant, such remedy might be a part of the law of the contract. But it has been repeatedly decided that although the law of the remedy would give the right, at the date of the contract, to coerce the performance thereof, by imprisoning the person for a failure; yet, that remedy, although, perhaps, the principal one looked to to secure its performance, may be taken away without impairing the obligation of the contract. So, in the cases I have cited, it has been held to be within the competency of the State Legislatures to shorten the time within which actions shall be instituted, to change existing rules of evidence, and to prescribe new rules of evidence within certain bounds; all to affect past as well as future contracts.

Perhaps the language used in 2 Howard should not be considered as intended to apply to any subject of legislation

Nov. Term, 1861. *SCOBEE v. GIBSON.* other than that immediately under consideration, namely, the competency of a State Legislature to change, as to existing contracts, the rates at which property should be sold, when aid is sought of remedial laws to enforce such contracts. This would leave the adjudications upon somewhat similar questions still in force, for our guidance.

Viewing the question in this light, and looking to the language of the chief justice, in 2 Howard, to wit, that "Although a new remedy may be deemed less convenient than the old one, and may in some degree render the recovery of debts more tardy and difficult, yet it will not follow that the law is unconstitutional." I am not prepared to consider whether the statute under consideration, "so changes the nature and extent of existing remedies, as materially to impair the rights and interests" of the defendant in this case, 8 Wheat. 1, or whether "the provisions of the law are so unreasonable as to amount to a denial of a right, and call for the interposition of the Court." *Jackson v. Lamphire*, 3 Peters, 290.

First, then, as to the obligation of the contract, "in the sense in which those words are used in the Constitution, is that duty of performing it, which is recognized and enforced by the law." 15 How. 319.

I can not perceive that this statute, except as may be hereafter noticed, so changes the law, previously in force, "that the means of legally enforcing this duty are materially impaired." *Id.* Upon the failure of the defendant to comply with the terms of his contract, the law, existing at the time of entering into the same, and recovering judgment thereon, was the same; as to the right to institute, and the manner of prosecuting to final judgment, a suit to enforce the said contract; and also as to suing out and prosecuting execution upon such judgment as to personalty, and also as to real property, until the sale thereof should be effected; thus far there is no difference. Up to this point, under the old law, the right vested in the defendant to prevent the title to his land from passing from him, by paying the judgment and accrued interest, &c., at the rate of six per cent. per annum, in ordinary judgments. This law steps in and extends that right for one year, to such defendant, his heirs, &c., by

his paying the amount bid, the purchase money and interest, at the rate of ten per cent. per annum. In other words, a clear title can not pass to the purchaser, until one year expires, and in the mean time junior incumbrancers may, by taking certain steps, resort to said real property as a fund for the discharge of their claims. The inquiry presents itself at once, whether this "materially impairs the rights and interests" of the plaintiff. What are those rights and interests? As respects the point now being considered, he would have a right to resort to the real property as a fund to satisfy his debt. His interest would be to have the land, upon such enforced sale, pay such debt. His right to resort to such property is not affected. Is the interest he has in making his money out of it? Would it materially decrease the value of the fund which he thus had the right to resort to? Two parties may be regarded as probable purchasers at such sale, namely, the plaintiff, and strangers to the record. As to the plaintiff, if he purchases he should be viewed as doing so to obtain satisfaction of his debt, and not as a matter of speculation; and that he thus takes title to the property to enable him to ultimately turn it into that which was promised—money. If he should obtain such title immediately after the purchase, he might, in a shorter time than a year, be able to so dispose of such property, or he might not. Conceding that he could, then the result is that, under this law, he would have to be delayed in disposing of it until the expiration of the year, or make such disposition conditionally. I can not see that the injury would be any thing more than the delay; for, in this country, where lands are continually increasing in value, it is not to be supposed the fund, for the payment of the debt, would deteriorate in value. So, if the land should be redeemed at the end of the year, the interest to be paid would be more than he would have been entitled to on an ordinary judgment, and the delay would be all he could complain of. As to mere inconvenience and delay, the reasoning in 1 Howard shows that they do not render the new act unconstitutional.

As to a purchase by a third person, a stranger; it would depend, perhaps, upon the motive with which the purchase

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should be made, whether the property would bring as much when sold under this right to redeem, as without it. If a man desired the property for a home, the chances are that in a majority of such cases it would not. If the purchase was on speculation, I can see nothing to prevent it from selling for as much, subject to the redemption. Indeed, it appears to me it would, in a majority of such instances, bring more; for this reason, if circumstances were such that the bidder should anticipate redemption it would be a safe investment, at a rate of interest higher than usually received. If redemption would not be probable, then I can not see that the mere delay in the execution of the deed by the officer would make a material difference in the amount of the bid.

As it is within the knowledge of the Court, as a part of the public history of the State, that a very large part—much more than a majority of the purchases of real property at forced sales—when made by strangers to the record, are on speculation. I am of opinion that the general effect of the statute will not be to decrease the value of this fund for the payment of creditors; but that it will produce a contrary result.

Thus much as to that part of the statute affecting sales upon ordinary judgments; as to that part of the same, in reference to proceedings on orders of sale issued on decrees, so far as the same regulate such proceedings on the sale of lands on foreclosure of prior mortgages, a different conclusion would appear inevitable. The question is already settled by the case of *Bronson v. Kinzie*, *supra*; and if it was not, the reasons are unanswerable.

The mortgage conveys the legal title to the mortgagee; subject to be defeated though, upon the performance of certain acts therein specified by the mortgagor. Where the mortgage is to secure the payment of money, the legal title thus transferred, is regarded, in equity, as a trust estate for the payment of the same; and after such payment, from said estate, the balance is a resulting trust to the mortgagor. To avail himself of this security, and extinguish the equitable interest of the mortgagor, the mortgagee is entitled to the

aid of the Court, in procuring the sale of such property. Upon prior contracts of this character, this statute would operate directly, in this, that it might create an equitable estate in such lands in persons not known to such contract; and would extend the time in which the equitable estate or interest of the mortgagor could be finally extinguished, and would thereby, as to duration, increase that estate.

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I am of opinion, for these reasons, that so much of said law as affects ordinary judgments and proceedings upon prior contracts, is binding and valid; but so far as it may affect judgments and proceedings upon ordinary mortgages, it is unconstitutional, and, therefore, invalid.

I have thus attempted to show that the law is valid, in view of the adjudications heretofore had in the Supreme Court of the *United States* upon kindred questions. I have not looked at it as an open question, but as one hedged around by those decisions. If they were out of the way a broader field would be open for discussion, in reference to the question of the validity of such statute, or its consonance with the constitutional provisions.

Oscar B. Hord, for the appellant.

B. W. Wilson, for the appellee.

LEE v. DILLY, ADMINISTRATOR OF DILLY.

APPEAL from the *Washington Common Pleas*.

Per Curiam.—Suit on note. Answer, payment and set-off.

Thursday,
February 8.

There was a special finding by the Court of the amount due on the note, including interest; and also of each set-off, and the time when it accrued. The Court appears, in the conclusion based upon those findings, to have fallen into the error of allowing interest on the note up to the day of judgment, and none on any set-off, although several years had elapsed

Nov. Term, since they had accrued, by the delivery of money to the
1861. payee of the note.

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The judgment is reversed, with costs. Cause remanded, &c.
C. L. Dunham and Horace Heffren for the appellant.

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JUSTICE v. KIRLIN.

Suit by *A.* against *B.* for slander. The complaint averred that before the time of speaking the slanderous words, a sum of money had been stolen from one *C.*, and that *B.* spoke of, and concerning the plaintiff, these false and slanderous words, viz., "He is the man that took the money, I know it." A witness for the plaintiff having testified to the speaking of the words, was then asked, "what did *B.* mean by the language he made use of?" to which the witness answered, "he meant, I suppose, that *A.* was the man who stole the money."

Held, that as there was no averment that any of the words used had a local or provincial meaning, the jury should have been left to judge, from the speaking of the words, and the attending circumstances, of the meaning intended to be conveyed by the use of them; but as the circumstances attending the speaking of the words showed that they referred to the larceny, the defendant was not harmed by admitting the evidence.

Held, also, that where a witness is inquired of as to the state of feeling existing between the parties to an action of slander, with a view to establish malice, the question should be directed to the time of speaking the slanderous words.

Held, also, that as words spoken by an influential person would have a greater tendency to make a fixed impression than if spoken by one without influence, it is competent for the plaintiff to prove, in an action of slander, that the defendant was a person of influence in the community.

Held, also, that after the defendant had, under a plea of justification, been permitted to prove by a witness in whose possession one of the stolen bills was found, that he got it of the plaintiff, and that he had taken it back on request, it was competent for the plaintiff to prove that the witness, when first inquired of as to where he got the bill, had answered that he had got it of another person than the plaintiff.

Thursday,
February 6.

APPEAL from the *Carroll* Circuit Court.

HANNA, J.—*Kirlin* sued *Justice* for slander, averring that on, &c., at, &c., he was post master, carried on a grocery,

and worked at his trade of shoe and boot making, and was deservedly a person of good name, &c., and that theretofore, a certain amount of money, to wit, \$50, of one *Andrew McDonald* had been stolen, &c., by some person or persons, and the defendant well knowing the premises, but contriving, &c., did on, &c., at, &c., falsely, &c., speak and utter, of and concerning the said larceny, and of and concerning the plaintiff, the false, &c. Here several sets of words are set forth, some containing charges slanderous in themselves, and some that were not of themselves slanderous, such as, "he is the man that took the money, I know it," with an innuendo that plaintiff meant, &c.

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V.
KIRLIN.

There was a demurrer to the complaint, on the ground that it did not state facts sufficient, which was overruled. There was no objection taken to the sets of words separately.

The objection urged here to the complaint is, that it does not aver the innocence of the plaintiff of the larceny. We shall not stop to discuss the question of whether such an averment was necessary or not, for it appears to us the allegation that the speaking was false, sufficiently covers the objection made.

One *Blue* had testified that the defendant used the following language in speaking of the money of *McDonald* that had been stolen. "*Kirlin* was the man who took the money, and I know it."

The plaintiff then asked this question of the witness, "what did *Justice* mean by the language you have stated he made use of?" Answer. "He meant, I suppose, from the way I took it, that *Kirlin* was the man who stole the money."

There was an objection to the question, &c., overruled. It is now insisted this ruling was wrong. There is no averment in the pleadings, by way of inducement or explanation of the language laid as having been used, other than as herein set forth. As the language here proved to have been spoken, and the corresponding words laid in the complaint do not, *per se*, convey the meaning the plaintiff would wish to assign to them, a prefatory inducement was necessary to show that they were actionable. In such case four positive

Nov. Term, 1861. allegations would appear to be required: *First*. The fact of such larceny. *Second*. A speaking by the defendant, with reference to such larceny. *Third*. The words spoken. *Justice* *Fourth*. That the defendant meant thereby to impute larceny to the plaintiff in that transaction. As there was no averment that any of the words alleged, or proved to have been used, had a local or provincial meaning, we are of opinion that the speaking of the words, with the circumstances attending the same, should have been detailed to the jury, and let them judge of the meaning. 3 Ex. Rep. 200; *Harrison v. Bevington*, 8 C. & P. 594; 2 Gr. Ev., § 417.

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The next witness, one *Greene*, was asked a very similar question, and permitted to answer in like manner, namely, "what did the bystanders understand *Justice* to mean by the language you said he used? The language used was, "*Mr. Kirlin* was the man that took the money." We do not perceive but that the same objections existed to this as to the former ruling.

We are not able to see the necessity of the inquiry of either witness, under the circumstances, for the testimony of each, we think, showed that the speaking was in reference to the larceny of the money of *McDonald*, outside of their answers to the interrogatories.

We are of opinion that, under the circumstances, if the proceeding in asking and eliciting answers to said questions and the rulings thereon, were not strictly correct, yet that no injury could thereby have resulted to the defendant.

This witness, in detailing the conversation that occurred, stated, that something was said about a one dollar bill, and about *Mr. Buckley* having got the bill of *Kirlin*.

The plaintiff then asked the witness this question, "Is the *Buckly* of whom you speak, the same person that was taken up for stealing, two or three weeks ago?" Over the objection of the defendant the witness was permitted to answer in the affirmative.

The answer filed was, 1. Justification, in this, that plaintiff had stolen said \$50. 2. Justification, because he had stolen one dollar, and that it was the same, &c. of which defendant spoke. 3. In mitigation that a larceny had been

committed, and rumors and suspicions had fixed upon plaintiff, &c., whereupon, &c. 4. General denial. Nov. Term, 1861.

It is insisted that the inquiry was intended to convey, to the jury, the impression that *Buckly* had been arrested for the larceny charged to have been committed, and thus ward off from *Kirlin* the imputations that might be cast upon him, by the evidence in reference thereto.

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So far as the evidence had progressed at the time the question was put, there was nothing implicating either *Buckly* or *Kirlin* in said larceny. It is true that it was afterward developed, by the evidence of other witnesses, that a one dollar bill, identified by *McDonald* as one he had lost, was found in the hands of one *Buckly*, who, on being apprized of its identity, presented it to *Kirlin*, on the ground that he had received it of him, and that *Kirlin* gave him other money for it. The question was therefore premature, except for the mere purpose of identifying the person, and, perhaps, raising an inquiry in the minds of the jury as to his character. It did not necessarily imply that he had been arrested for that larceny. The inquiry was not afterward pursued by either party, to show that he had been arrested, nor was he a witness, nor any evidence of the reason for his not being one. Nevertheless, we can not see that any particular harm could result from the ruling objected to, especially as the defendant, for ought that appears, could have introduced *Buckly* as a witness, to explain the transaction and show his innocence.

One *Farneman* was then introduced, who was asked a question as to the feelings of the parties towards each other at the time when the words were spoken; and answered, they were unfriendly. This question was then propounded by plaintiff: "What do you know, if any thing, of the defendant having malicious feelings towards plaintiff." Over defendant's objection, witness was permitted to answer as follows: "The state of feeling then was not good between them; my judgment is that the defendant was rather maliciously disposed against the plaintiff." It is objected to the question, that it was in the present tense, had relation to his feelings at the time it was propounded, and was therefore

Nov. Term, objectionable. Without doubt it was open to the objection
1861. made, and an answer should not have been allowed. But as
JUSTICE the answer was given, when we come to examine it, so far as
V. *this* objection extends, we do not see any harm that could
KIRLIN arise from such answer. The witness, perhaps, keeping in view
the previous question, as well as the one then submitted to
him, appears to have directed his answer to some previous
time, and there was nothing that had preceded this answer,
fixing any prior period of time, except that of the speaking
of the words, to which the word "then" in the answer must
therefore be referred. After the examination of several
other witnesses, relative to the feeling between the parties,
and various statements of defendant, this question was put,
by the plaintiff to *Andrew McDonald*, a witness: "State
the defendant's position in society, as to being influential
or otherwise, in the community where he resided." Over
the objection of defendant, he was permitted to answer:
"He was an influential man, still he had a good many
enemies."

We can not see any bearing the question had on the issues
being tried, unless it might be in reference to the measure
of damages. Would it have the effect to influence the jury
in assessing damages; and if yea, was it admissible for that
purpose? Certainly an opinion given, or words spoken, by
an influential person, would have a greater tendency to make
a fixed impression, than if spoken by one without influence.
It is more than probable, therefore, that such proof did make
an impression upon the jury in fixing a standard by which
to estimate the damages. We are of opinion the evidence
was properly admitted for that purpose. If the parties were
strangers to the jury—and whether or not, they should de-
cide from the evidence before them, and must therefore be
informed of the probable extent of the injury to be enabled
to estimate the damages. 2 Gr. Ev., § 269, and note.

Aaron Buzzard, a witness, stated, on the part of the plain-
tiff, that he was at the time of the alleged larceny acting as
a clerk in a store, in, &c., and had been requested to keep a
look out for a one dollar bill with *Jesse Dillon's* name on
the back of it; that about a week thereafter Mr. *Buckly*

brought in a bill filling the description, and gave it to him in payment for goods. Nov. Term,
1861.

The bill was presented to the witness and identified as the one returned to *Kirlin* by *Buckly*. The plaintiff then asked the witness, "What *Buckly* said about the bill, and where he got it, when you asked him where he got it, if you did ask him." Objected to. Answer: "*Buckly* at first said, when I asked him where he had got the bill, that he got it of *John Peck*; he afterward said that he got it of *Kirlin*. He did not appear to be excited. He went out of the store and was gone a few minutes, when he came back and said that he was glad that he had found out where he had got the bill, that he got it of *Kirlin*, for if he had not, the people would have suspicioned him."

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V.
KIRLIN.

It is urged that this evidence was irrelevant—was mere hearsay. Of course it was not intended by the plaintiff to fix guilt or the suspicion thereof upon himself, but to weaken the force of the testimony which had preceded it in regard to the return of the bank note to the plaintiff by *Buckly*. The evidence shows that several persons had been commissioned by *McDonald* to assist in detecting the guilty parties, this witness and defendant among others. The bank note presented to witness was one of the clues by which the detection was anticipated. *Buckly* having it in his possession so soon after the larceny, made it incumbent upon him to account for that possession—to rebut any presumption that might arise. We need not discuss the question of whether his statement, of where he obtained it, would be evidence against any third person. We do not understand the purpose to have been to show that *Peck* was the guilty party; but to show that, when first questioned, *Buckly* was not so certain, as his acts afterward indicated, that *Kirlin* was the person from whom he obtained the note, and perhaps to show that he was anxious to avert suspicion from himself. The defendant had shown acts and statements of *Buckly* in returning the bill to *Kirlin*. This evidence had a tendency, perhaps but very slight, to contradict such acts and statements, and was therefore admissible.

The last point made is that the damages, five hundred

Nov. Term, 1861. **NEW ALBANY, & C. RAILROAD CO. v. HIGMAN.** dollars, were excessive. It may be true that the acts of the plaintiff, as shown by the evidence, and the question of doubt thrown over his general character for honesty, should have mitigated the damages; but still we are not prepared to say, from any thing in the record, but that the jury did weigh these matters in their deliberations and permit them to enter into their verdict.

We have thus noticed the points made in the brief of counsel.

Per Curiam.—The judgment is affirmed, with 3 per cent. damages and costs.

D. D. Pratt and *L. B. Sims*, for the appellant.

NEW ALBANY AND SALEM RAILROAD COMPANY *v.* HIGMAN.

Thursday,
February 6.

APPEAL from the *Tipppecanoe* Circuit Court.

Per Curiam.—Suit to recover for consequential damages, resulting from the overflow of lands of plaintiff, caused by construction of the road of defendant.

The pleadings were such as to present the question of the liability of the company for such damages, and, if liable at all, whether the remedy should be sought by the statutory application for damages, or by a suit; and if by suit, whether the same could be brought after two years, &c.

These questions have all been decided, against the appellant, in the case of the *Board of Trustees, &c. v. Spears*, 16 Ind. 441.

The judgment is affirmed, with 1 per cent. damages and costs.

H. W. Chase, J. A. Wilstach and *J. E. McDonald*, for the appellant.

J. Pettit and *Huff & Jones*, for the appellee.

HERRON, RECEIVER OF THE SAVINGS BANK OF INDIANA v.
VANCE and Others.

Nov. Term,
1861.

HERRON
v.
VANCE.

All corporations organized under the provisions of the act of *June 15, 1852*, establishing general provisions respecting corporations, (1 R. S. 1852, p. 239,) are considered as in being for three years after they shall have ceased, legally, to exist, for the purpose of their organization, in order that the affairs of such corporation may be properly closed up, if necessary, by suits to be conducted in the name of the defunct body.

As corporations might be organized under the act of *June 15, 1852, supra*, of such a character as to fall within the class of "moneyed corporations," as intended by § 28 of the act to regulate the business of general banking, (1 R. S. 1852, p. 159,) it appears to follow that so far as proceedings to dissolve corporations for banking purposes, and the appointment and duties of a receiver are governed at all by special statute, the act establishing general provisions respecting corporations, (1 R. S. 1852, p. 239,) should maintain.

Quære: Whether, in view of these statutes, any averments could be made in a complaint showing authority to prosecute or defend suits within three years, in the name of a receiver, or in any name other than that of the corporation.

The liability of each stockholder for the shares of stock subscribed by him, is several, and not joint with the other subscribers; and hence, a joint suit for the collection of the amounts due upon subscription will not lie; but where there is an averment of the insolvency of the corporation, and a prayer for a settlement of its affairs, all the stockholders may be joined in one suit, under an order of the proper court to that effect, so as to adjust the whole affairs of the corporation, and determine their respective rights and liabilities, and cross equities.

The complaint should, in such case, be accompanied by a copy of the articles of association of the bank, and should contain proper averments of the liability of each person whose signature appears thereto.

APPEAL from the *Fayette* Common Pleas.

HANNA, J.—The appellant was the plaintiff below. A demurrer was sustained to his complaint, which is the only error complained of.

It was averred in the complaint that the *Savings Bank of Indiana* was organized under the act of *May 28, 1852*, 1 R. S. 1852; and that on *December 25, 1856*, the appellees were owners and stockholders of the capital stock of said bank, and were, each in his own right, shareholders of said

17	595
128	224
17	595
134	673
17	595
158	227

Thursday,
February 6.

Nov. Term, banking association, and held the number of shares respect-
1861. ively, &c., as set forth in a schedule therewith filed, contain-

HEBRON

V.
VANOR.

ing a list of the names of the stockholders, the number of shares, &c., and a copy of the by-law under which they were subscribed.

It is further averred that certain of said defendants, named, were the original stockholders at the organization, &c., to the requisite amount of fifty thousand dollars, all of which remains unpaid; that in 1857 said association became insolvent, their notes protested, their securities sold by the auditor of State, and applied *pro rata* to the payment of said circulation to the amount of sixty-two cents to the dollar, leaving unpaid thirty-eight cents to the dollar; that the debts owing by said association amount to ten thousand dollars, and judgments against the same to five thousand, making, together, fifteen thousand dollars; and that the assets amount to not over three hundred dollars, which have come to the hands of said plaintiff.

That said stockholders have failed to pay off their stock; that to pay said debts it will require the whole amount due on said stock; and an amount from each stockholder, in addition, equal to the amount of stock held by each subscriber. That the auditor of State had failed to institute any proceedings for the redemption of the balance of said circulating medium. Prayer, that the affairs of said bank should be settled, and said stockholders compelled to pay the balance due on their stock, and such other sum as might be necessary, not exceeding, &c., so as to enable plaintiff to pay said debts, &c.

The demurrer assigned for cause of objection, that plaintiff had no capacity to sue; that there was a defect of parties defendant; that causes of action were improperly united; that the complaint does not state facts sufficient.

The general act, under which the banking association was organized, does not provide for the appointment of a receiver, otherwise than when it "shall violate any of the provisions of this act, such associations may be proceeded against and dissolved by the court, on application by the auditor, or any creditor thereof, in the same manner as any moneyed

corporation may be proceeded against and dissolved." § 28. By another statute, 2 R. S., p. 198, provision is made for proceedings against corporations that may do or omit acts which "amount to a surrender or forfeiture of their rights and privileges as a corporation," and if judgment be rendered against any corporation, the "Court shall restrain the corporation, appoint a receiver of its property and effects, take an account, and make a distribution thereof among the creditors." An act in relation to receivers provides, among other things, that a receiver may be appointed by the Court "when a corporation has been dissolved, or is insolvent, or is in imminent danger of insolvency, or has forfeited its corporate rights," and that he may, under the control of the Court, bring and defend actions, collect debts, &c., 2 R. S., §§ 199, 205, p. 73, "and, generally, do such acts as the Court may authorize. *Id.*

Nov. Term,
1861.

HERRON
v.
VANCE.

The first question presented is as to the right of *Herron* to sue in his own name. In the complaint he represents himself to be a receiver, but does not disclose by what authority he became such; nor, if appointed under these statutes, what acts the Court had authorized him to perform; whether he had been directed to sue for unpaid subscriptions of stock. It appears that, formerly, he would not have been authorized to sue in such an instance, that is, if regarded as a mere receiver in chancery. *Ingersoll v. Cooper*, 5 Blackf. 427; 2 St. Eq., § 833; *Mann v. Pentz*, 3 Comst. 423; Edwards on Receivers, p. 3. The question, therefore, is, whether these statutes confer authority to sue in this case in the name of the receiver, and if so, whether enough is shown in the complaint? In this connection it may throw some light, in giving the proper construction, to notice the twelfth section of an act establishing general provisions respecting corporations, 1 R. S., p. 239, that provides where the charter of a corporation shall expire, that within three years the proper court shall, on application, &c., appoint a receiver, or trustee, to take charge of the estate, effects, &c., "with power to prosecute and defend, in the name of the corporation or otherwise, all suits, &c." And the sixth section of the same act continues, as bodies corporate for three years, all

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v.
VANCE.

corporations whose "charters shall expire by limitation, forfeiture, or otherwise," to enable them to prosecute and defend suits, settle, &c.

Taking these two sections together, it is apparent that all corporations organized under the provisions of that act, are, for certain purposes, considered as in being for three years after they shall have ceased to legally exist for the purpose of their organization; that is, that the affairs of said corporation may be properly closed up, if necessary, by suits to be conducted in the name of the defunct body, which the law makers appear, perhaps correctly, to have thought could not be done without an act upon the subject.

As corporations might be organized, under this act, of such a character as to fall within the class of "moneyed corporations" referred to in the statute first herein cited, it would appear to follow that, so far as proceedings to dissolve corporations for banking purposes, and the appointment and duties of a receiver, are governed at all by special statutes, the one quoted, on the subject of general provisions respecting corporations, shall maintain.

From this conclusion, it would appear to be clear that without averments, other than those contained in the complaint, the suit should be in the name of the corporation for debts, &c. due it, and not in the name of a person who merely styles himself a receiver, without showing special authority to sue. It is not necessary, nor do we decide, whether or not, in view of these statutes, averments could be made showing authority, within the three years named, to prosecute or defend suits in any name other than that of the corporation.

This leaves the way clear for the discussion of the second question, which is, as to the right of the receiver, or the corporation, if its name should be substituted, to maintain an action against stockholders for a sum, over and above the amount of their stock, equal to the shares of stock held by each. But, preliminary to the discussion of the right to sue, we might notice that the complaint does not make a case in which that right should be exercised, if it exists. The

debts, &c. of the corporation are stated at fifteen thousand dollars; the stock subscribed, at fifty-eight thousand five hundred dollars, accompanied with an averment that said subscriptions remain wholly unpaid.

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1861.

HERBON
v.
VANCE.

Without stopping to consider what effect this averment, if true, would have upon the organization of the corporation, we think it is clear that if the debts and the amount due on subscription are as stated, then there is no necessity shown for a resort to any sum beyond that so due; indeed the reverse is shown. Therefore, the complaint, in that respect, was bad conceding the right to sue, as to which we are of opinion that he might, perhaps, if the order of the Court by which the receiver was appointed, and his "acts authorized," had directed him to take an account of the assets, &c., and if found insufficient to pay the debts, &c., then to sue for unpaid parts of capital stock, and report to the Court the condition, &c. of the affairs of the corporation and the names of stockholders and amounts held by each. The Court could then, perhaps, direct such proceedings as would determine the contributive share of each stockholder necessary to pay said debts, &c. But it is not absolutely necessary, in this case, and therefore we would not be understood as deciding these questions. In *New York*, from which, to a great extent, we derive our free bank system, all these points are regulated by statutory provisions; and the numerous adjudications in reference thereto do not give us much light.

The next inquiry is as to the propriety of joining all the stockholders in one suit. So far as the liability exists, of each, for shares of stock, it is several and not joint. A subscriber for one share can not be held for the payment of the fifty shares of another. Therefore, for the mere collection of the amount due on subscriptions, the suit was wrong, as against all; but as there is an averment of insolvency, and prayer for a settlement of the affairs of the institution, we are of opinion that, under an order of the proper court to that effect, all the stockholders might be made parties so as to adjust the whole affairs of the institution and determine their respective rights, liabilities, and cross equities; especially as the stock and other property of the corporation is

Nov. Term, 1861. deemed a trust fund for the payment of its debts. 2 St. Eq., §1252.

OILER
v.
BODKEY.

The statute authorized any number of persons to associate so as to avail themselves of the provisions of said act, §17, and required them under their hands and seals to make a certificate specifying certain things, §18, among which are the name, the amount of capital stock, the location, and time of commencement, of said association; and names and place of residence of shareholders and number of shares by each held. Which certificate was to be filed in the clerk's office of the county, and in the office of the secretary of State, and the same, or copies, should be used as evidence for or against, &c. §19.

It is insisted that the suit should have been founded upon this certificate, or articles of association, as named in another part of the act, §27, subdivision 11, and that the same should have been filed with the complaint.

We think, without doubt, this should have been done, accompanied by proper averments of the liability of each person whose signature appeared thereto, by virtue of the contract. If any special reasons existed for attempting to make others liable, whose names did not appear thereto, they should be shown, together with the excuse for their not so appearing, that the Court might determine as to their legal liability.

Per Curiam.—The judgment is affirmed, with costs.

John S. Reid, for the appellant.

James C. McIntosh, C. B. Smith, Geo. Holland and Wilson & Newkirk, for the appellees.

17	600
239	407
17	600
145	420

OILER and Another v. BODKEY and Another.

A pleading stricken out on motion forms no part of the record unless made so by bill of exceptions.

Parol testimony is not admissible to vary the terms of a written contract,

by proof of a verbal contract about the same subject matter, made at or before the time of making the written contract.

Nov. Term,
1861.

An erroneous admission of testimony on the trial is not brought in review by a general assignment in the motion for a new trial of "errors of law occurring at the trial," &c., but where excessive damages is also assigned as a cause, the Supreme Court will look into the question of the illegality of the testimony in determining the question of excessive damages.

OTLER
v.
BODKEY.

APPEAL from the *Clinton* Common Pleas.

Thursday,
February 6.

HANNA, J.—Suit on a note. The first paragraph of the complaint was simply in the usual form. The second set up a parol contract for the purchase of wheat, &c. This latter paragraph was stricken out on motion. The ruling was excepted to, but no bill of exceptions was filed thereon, consequently it formed no part of the record.

The defendants answered, pleading a set-off; namely, three parcels of wheat, to the amount of 419 bushels, delivered to the plaintiffs, after the execution of the notes, as alleged; and that at each delivery there was executed a writing as follows, to wit: "Received of *Hendrickson & Oiler* three hundred and eighty-one bushels of white wheat, for which we agree to pay the market price at *Logansport*, less ten cents per bushel, when called for." Signed by the plaintiffs.

In reply, the plaintiffs, 1. Denied generally. 2. Admitted the reception of the wheat, but averred that it was received as alleged in the second paragraph of the complaint, &c.

As the second paragraph referred to was not in the record, it left this part of the answer mere surplusage. There was no issue made by the reply except the denial.

The pleadings being in this condition, the plaintiffs, after the introduction of their note, were permitted, over objections, to offer oral evidence of a parol contract, made some time before the execution of the writing, or the reception of the wheat, in reference to a purchase of the wheat. By the agreement thus proved the defendants received the money, for which the note was executed, on the delivery of the wheat, for which they were to pay interest until they notified plaintiffs that they were willing to close at ruling prices, and were to have until *June 1* then next to determine. If they gave no notice, until the last named day, plaintiffs

Nov. Term, 1861. were to account for the wheat at the ruling price on that day, &c.

OILER
v.
BODKEY.

The note sued on was for \$416, with a credit thereon of \$75. On the trial the plaintiffs had a verdict, and judgment for \$140. Special findings showed that wheat was worth at *Logansport* at the date of the receipts, \$1.25; on *June 1*, fifty-five cents; on *September 21* following, when the demand was made, ninety cents.

A motion for judgment on these findings was overruled. It is evident that the general verdict was based upon the price of wheat on *June 1*. This was erroneous. *Evans v. Da'le*, 14 Ind. 288. It was also error to admit the oral evidence of a parol contract varying that contained in the writings executed upon the reception of the wheat; though perhaps the question upon the legality of the ruling in receiving that evidence is not brought before us by the general reason filed for a new trial, namely, that error of law occurred at the trial, 14 Ind. 322; *id.* 405; *id.* 417; but upon the reason assigned that the damages were excessive, the Court would look to the evidence, and see that, leaving out that which was thus objected and excepted to, there would not be sufficient to base the verdict upon. In determining whether it should be left out of consideration, the Court would necessarily decide whether it was legitimate.

The finding of the jury as to the price of wheat at the time of notice and demand should have controlled.

Per Curiam.—The judgment is reversed, with costs. Cause remanded, &c.

Davidson & Purdum and *McDonald & Roache*, for the appellants.

J. N. Sims, for the appellees.

THE EVANSVILLE, INDIANAPOLIS AND CLEVELAND STRAIGHT LINE
RAILROAD COMPANY v. DUNN.

Nov. Term,
1861.

EVANSVILLE,
&c.
RAILROAD CO.
v.
DUNN

17 603
4154 200

Suit by a railroad company upon a promissory note. Answer: that on

March 14, 1855, defendant subscribed for twenty shares of the stock of said company, of \$50 each, upon the express condition that the final location of the road should cross *White* river, near *Martinsville*, and run within one mile of *Gosport*, and continue down on the west side of said river to the town of *Spencer*, and that before the bringing of this suit, said company had finally located said road on the east side of said river; that said promissory note was given in consideration of said subscription, &c. Reply: that the said road had been located, in pursuance of the condition of said subscription, on the west side of *White* river, &c. The note was dated *September 25, 1856*.

Held, that the condition of the subscription was waived by the giving of the note.

APPEAL from the *Owen* Circuit Court.

Thursday,
February 6.

PERKINS, J.—Suit upon a promissory note of the following tenor:

"\$700.

INDIANAPOLIS, *September 25, 1856*.

"Fifteen months after date, I promise to pay to the order of the *Evansville, Indianapolis and Cleve'and Straight Line Railroad Co.*, at *Spencer*, seven hundred dollars, value received; without any relief whatever from valuation or appraisement laws.

"S. W. DUNN."

The defendant answered:

1. That the note was executed without consideration.
2. That on *March 14, 1855*, at *Owen* county, the defendant subscribed to the capital stock of the *Evansville, &c., Railroad Co.* twenty shares, of fifty dollars each, amounting to one thousand dollars, subject to, and upon the express condition thereunder written, to wit: "That the final location of the road (to wit, the railroad of plaintiff) should cross *White* river, near *Martinsville*, and run within one mile of *Gosport*, and continue down on the west side of *White* river to the town of *Spencer*;" and the defendant avers that, before commencing this suit the plaintiff finally and permanently located her said road on the east side of *White* river, from *Martinsville* to *Spencer* aforesaid.

Nov. Term, 1861. To this paragraph of the answer, the Court overruled a demurrer.

EVANSVILLE, The plaintiff then replied :

&C. 1. Denying the answer.

RAILROAD Co.

v.

DUNN.

2. That on *May* 11, 1845, the railroad was permanently located down the river, on the west side thereof, according to the condition of the subscription; which location was subsequent to any, and all supposed, locations on the east side of said river.

To this paragraph of the reply the Court sustained a demurrer. There was a trial of the issues; judgment for the defendant. The evidence is not of record. The first question arises upon the overruling of a demurrer to the second paragraph of the answer; was that paragraph a legal bar to the action? Let us examine it. The suit was upon an unconditional promissory note, dated *September* 25, 1856, for the amount of \$700, all payable, without interest, at the expiration of fifteen months.

The answer alleged that that note was given in discharge of a subscription to the railroad, made on *March* 14, 1855, being over eighteen months prior to the date of the note, which subscription, it is to be inferred from the answer, was then, to wit, at the time it was made, due and payable, but was made upon the condition, either precedent or subsequent, that the road should be located on a certain line. The condition was a single, entire thing, and related to place of location. Does this answer show that the note was upon the same consideration, and was simply a re-expression of the original contract of subscription?

Let us transpose the statement of the facts, so as to make it follow the order of events.

On *March* 14, the defendant agrees to take and pay for twenty shares of the plaintiff's stock, on condition that the road has a certain location. The consideration for his money, then, is to be the stock and the particular location of the road. Now, if by a fair construction of the contract of subscription, the money was to be paid before the road was located, then the location was a condition subsequent. But, if by a fair construction of the contract, the road was to be located

before the money was to be paid, then the location was a condition precedent. In either event, it was a condition in the contract, upon which the party might stand, or which he might waive, as it was a condition for his benefit. What next takes place between the contracting parties? Why, a year and a half after this conditional, and so far as may be inferred, immediately payable subscription is made, a new executory contract is stated in writing, between the parties. Is it a re-expression of the original one? Does it fix the the same times and terms of payment, or does it change them? It changes them; it provides for an extension of the time of payment from its date, for fifteen months, on the part of the road, and it omits the condition as to location on the part of the subscriber thereto, *Dunn*. Now, what is the inference from this change which the contracting parties were competent to, and voluntarily did, make? Is it not, clearly, that the condition as to location was waived? We think so. Had *Dunn*, at the time named, paid the money on his original subscription, it being then due, such act would not have waived the condition, if a subsequent one, because it would have involved no change in the original contract; and the case of *Jewett v. The Lawrenceburgh, &c. Railroad Co.*, 10 Ind. 539, would have been in point, in principle. But he did not pay upon the first contract; he substituted a new and variant executory contract for it. This, it was his right to do, if he could get the privilege; and having done so, he is bound by his new contract. The condition in the original was waived by it, because it was not continued in it; it was, in fact, abandoned, as a part of the obligations existing between the parties. This conclusion disposes of the case, and renders it unnecessary for us to proceed further. But, as the question as to what constitutes a location of a railroad, has been, to some extent, discussed, we propose to make a suggestion or two touching that question.

It may be premised, in advance however, that what we have to say is only applicable to cases where the statute contains no provision upon the subject. If, in any case, the law prescribes what shall constitute a location, or the particular manner in which one shall be made, of course the

Nov. Term,
1861.

EVANSVILLE,
&C.
RAILROAD CO.
V.
DUNN.

Nov. Term, 1861. statute will be the guide in determining whether one has been made. But suppose the statute contains nothing directory upon the point, what, as a question of law, shall be the definition of a location? And we now ask, is not, as a general proposition, a location the manifested or expressed determination of the corporation as to the line of the road? And may it not be necessary that that manifestation should be more particular and definite in some cases than in others, according to difference of circumstances? Suppose, for example, that the question arises between two railroad companies, both authorized to run railroads between two points, on the same general route, and the point is, which company has first located on a given one hundred miles of ground on the general route?

EVANSVILLE,
& C.
RAILROAD CO.
V.
DUNN.

Suppose again, the question to arise between a company and the owner of a certain piece of land, whether the road had been located on such piece of land, and if so, on what part of it?

Suppose again, the question to arise, as in this case, between the company and a conditional subscriber of stock, as to whether the road had been located on a given side of a river; in such case could it be considered that any thing further was in the mind of the contracting parties than the expressed determination of the company, that the line of the road should be constructed on such side of the river? We do not see what else could be in contemplation. The subscriber could care nothing about the particular hundred feet wide that should be taken through any man's farm. The fact of running the line by surveyors would amount to nothing, in itself, as the company might not adopt such survey.

It is not necessary that we should decide this point, as we have said, and we do not, but we make these suggestions as indicating the course of investigation to correctly determine the question.

Per Curiam.—The judgment is reversed, with costs. Cause remanded for another trial.

Jer. Smith, for the appellant.

W. R. Harrison, S. H. Buskirk, D. E. Williamson, Jno. A. Beal, J. E. McDonald and A. L. Roache, for the appellee.

KIRKMAN v. KENYON and Another.

Nov. Term,
1861.KIRKMAN
v.
KENYON.17 607
141 108

A. and *B.* entered into an agreement, in writing, by which *A.* agreed to sell and convey to *B.* a certain town lot, in consideration that *B.* would convey to him eighty acres of land in *Jasper* county. The land was to be selected as follows, viz., *B.* was to furnish to *A.* five hundred acres of land in said county, from which *A.* was to select an eighty acre tract; and when so selected, and a deed made for the same, then *A.* was to convey to *B.* the town lot, and give him possession at a given time. Suit by *B.* for a specific performance of the agreement, alleging that he had said five hundred acres of land, and furnished a description thereof to *A.*, and requested him to make a selection therefrom, which he failed and refused to do, and by reason of such refusal he could not make and tender a deed, &c.

Held, that an application for a specific performance is addressed to the sound legal discretion of the Court, and as *B.* had not tendered a conveyance for any particular tract, and did not make any averment as to the value of the lands, or give any description of the lands furnished to *A.*, from which to choose, a case was not made in which the Court could determine whether a specific performance could, or not, be equitably decreed.

APPEAL from the *Putnam* Circuit Court.Thursday,
February 6.

HARNA, J.—This was a suit to compel the specific performance of a written contract, in substance as follows: "*Kenyon* hath sold to *Kirkman*, lot, &c., in block, &c., for and in consideration that said *Kirkman* shall make me a deed for eighty acres of land in *Jasper* county, *Indiana*, and he shall furnish me with five hundred acres of land, from which I shall select said eighty acres, for which he shall make, &c., a good and sufficient deed, and then I shall make him a deed for said house and lot (before described), and give him possession of the same on the first of *October* next."

The plaintiff averred readiness to perform on the said first of *October*, and from thence continually, that he had the said five hundred acres of land during all of said time, and designated and pointed out the same to defendant, but could not make and tender a deed therefor, because said defendant did not select the particular eighty acres that was to be so transfered; that he afterward, to wit, on *March* 8, 1859, demanded a deed for said lot, and offered to transfer such

Nov. Term, eighty acres as should be by defendant selected; but he
1861. would not select the same, nor fulfill his part of said contract.

KIRKMAN
v.
KENTON.

A demurrer was sustained to the complaint, which presents the only point in the case.

The brief, upon the part of appellee, informs us that the demurrer was sustained, on the ground that the contract was so vague and indefinite that it could not be enforced; that it was inequitable, and the wife not a proper party, &c.

An application for a specific performance is not advanced as a matter of right, but is addressed to the sound legal discretion of the Court.

In the case at bar the contract is indefinite as to the description of the land in *Jasper* county; is silent as to the value of the same, or of each particular eighty; and as to the value of the house and lot. The complaint is not more definite. It does not even give the description of the five hundred acres, alleged to have been given to the defendant, nor the time at which said description was so furnished. It does not show that a deed had been tendered for any part of said five hundred acres, any particular eighty, nor that said lands had been withheld from market, that a selection might be made. The Court would not, perhaps, have felt called upon to compel a performance of a contract, under these circumstances, if the pieces of property were of greatly unequal value. As the plaintiff did not tender a conveyance for any particular piece of land, and the defendant it was averred would not choose, we do not see how the Court, from the pleadings, was to arrive at a conclusion in reference to the equity of the transaction. If the Court had ordered the lot, &c., of the defendant to be conveyed, and that he should, in a given time, make a selection, or on default that the plaintiff should convey some one piece of said land, such as he might choose, great inequality in the value might have been the result. If the plaintiff had been required to produce proof of the value of lands owned by him, such proof, for ought that appears on the record, might have been addressed to the value of some piece not included in the description furnished to the defendant. Whatever might have been the rights of the plaintiff if he had chosen to present the facts,

if he could do so, in a more specific form, we need not decide. All we do decide is, that we do not see any abuse of the discretion of the Court in requiring the plaintiff to more particularly present his case; or, if he could not, to go out of Court.

Nov. Term,
1861.

BURNHEISEL
v.
FIELD.

Per Curiam.—The judgment is affirmed, with costs.

John A. Matson and J. A. Scott, for the appellant.

Williamson and Daggy, for the appellees.

BURNHEISEL v. FIELD and Others.

Suit by an assignee, upon the following instrument, viz., "*Lafayette, Ind., December 4, 1856. Ten months after date, value received, pay to the order of A. B., assignee, five hundred dollars, and charge the same to account of yours,*" &c. [Signed] "*W. C.*" "To *E. W., Esq., Treasurer, N. Y.*" Across the face of the instrument was written, "Accepted for, and on behalf of, *The Toledo, Wabash and Western Railroad Company*, payable at," &c. [Signed] "*E. W., Treasurer.*" The instrument was indorsed, "Pay the within to the order of *K. & B.*" [Signed] "*A. B., assignee of J. M. F.*" By an indorsement of *K. & B.* the instrument was transferred to the plaintiff, who caused it to be presented and duly protested, and notices to be given, &c. It was averred in the complaint that *W. C.* was, at the time, &c., a chief engineer of said railroad, and that said bill was drawn on account of labor done in the construction of said railroad, &c.

Held, that if the doctrine is correct that there are instruments that may be treated by the holder as either a bill of exchange or a promissory note, this was clearly a case in which the holder was entitled to treat the paper as a bill of exchange, and subject to the laws governing such paper, and this right was not waived by the averment that it was drawn by an officer of the company for work done in the construction of the road.

APPEAL from the *Cass* Circuit Court.

Thursday,
February 6.

HANNA, J.—*Field* and others, assignees, sued *The Toledo, Wabash and Western Railroad Co., John T. Musselman, Alba Kendal and Henry Burnheisel*, upon an instrument in

Nov. Term, writing and the acceptance and indorsements thereon, as
1861. follows:

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FIELD.

"\$500. "TOLEDO, WABASH AND WESTERN RAILROAD CO., }
"LAFAYETTE, IND., Dec. 4, 1856. }

"Ten months after date, value received, pay to the order of *J. T. Musselman*, assignee, five hundred dollars, and charge the same to account of

"Yr. obt. servant, WARREN COLBURN.

"To EDWARD WHITEHOUSE, Esq., *Treasurer*,
54 William St., N. Y."

Across the face of the instrument was a writing, as follows:

"Accepted for, and on behalf of, *The Toledo, Wabash and Western Railroad Co.*, payable at No. 54 William St.

"EDW. WHITEHOUSE, *Treasurer*."

And the same was indorsed as follows:

"Pay the within to the order of *Kendal & Burnheisel*.

"JOHN T. MUSSELMAN, *Assignee of J. M. F.*"

And by *Kendal & Burnheisel* it was indorsed to plaintiffs; who caused it to be presented and protested for non-payment and notices to be given. These facts are averred in the complaint, and that *Colburn* was at, &c., the chief engineer, of said railroad, &c.; that the said bill was payable in the city and State of *New York*, and was drawn in *Indiana*, on account of work and labor done in the construction of the road of said company in said State.

A statute of the State of *New York*, upon the subject of promissory notes and bills of exchange, in reference to their negotiability and rate of interest, was set out.

Separate demurrers were filed by the railroad company, by *Kendal & Burnheisel* and by *Musselman*, to the complaint. They were all overruled and exceptions taken, but as no one has appeared or assigns error here but *Burnheisel* we need not notice any ruling but that in reference to the demurrer in which he was interested.

It is urged that the instrument sued on is not a bill of exchange but a promissory note only, and that, therefore,

suit should have been first brought against the maker alone in the first instance or an excuse shown for not suing.

It has been sometimes decided that an instrument may be so worded and negotiated as to be treated by a *bona fide* holder or indorsee, as either a bill of exchange or a promissory note. We do not think that from the face of the writing a stranger would be able to perceive that it was drawn by one servant of the company upon another servant of the same. There was nothing showing, if it could have been so shown, that the plaintiffs were apprized of the fact, when they received the writing, that it was drawn by the engineer of the corporation upon the treasurer thereof. It may be, therefore, from the appearance of the writing, and the steps they took in causing the presentation, protest and notices, that the plaintiffs believed it to be a regular bill of exchange, and treated it accordingly. We are not now discussing the right of a man to draw upon himself, or of one officer of a corporation to draw upon another, or the effect of such acts, when apparent upon the face of the instrument; but the effect of drawing in the form here shown, the character the paper should, *prima facie*, bear, and in what light received and treated by strangers.

If the doctrine is correct that there are instruments that may be treated by a holder as either a bill of exchange or a promissory note, then we are of opinion that so far as the circumstances are here shown, this was clearly a case in which the plaintiffs were justified in regarding and treating the paper sued on as a bill of exchange, subject to, and entitled to the benefit of the laws governing such paper. This would be the result unless they have deprived themselves of such right by the form of pleading adopted; that is, in the averments that the bill was drawn by an officer of the corporation upon another officer thereof, on account of work done for the same. We suppose the averment was inserted to avoid any question as to the right of the corporation to thus contract; and as the rights of the plaintiffs had already attached, to regard the paper as a bill of exchange, we do not think they changed that right, or lost it, by the averment, viewing it as made for the purpose indicated.

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1861.

BURNHEISEL
v.
FIELD.

Nov. Term, 1861. The Court adjudicated as to the rights of the appellant and *Musselman*, as between themselves, no reasons for a new trial were filed, and therefore we can not examine that question.

CROSS
v.
PEARSON.

Per Curiam.—The judgment, is affirmed, with 3 per cent. damages and costs.

L. Chamberlin, for the appellant.

D. D. Pratt, for the appellees.

CROSS v. PEARSON.

Suit by *A.* against *B.*, before a justice of the peace, upon a writing as follows, viz., "Twelve months after date, I promise to pay to the order of *A.* the sum of eighty dollars and fifty cents, value received; but should the beast prove unsound, a deduction to be made by two disinterested persons." Signed by *B.* This instrument had been assigned in writing to *A.*, and *C.*, the assignor, was made a defendant to answer as to his interest; but, on motion of the defendant, his name was stricken out. Answer: 1. That the note was given for the price of a horse, which was represented and warranted to be sound, &c.; that, in fact, said horse was unsound, &c., by reason of which the consideration of said note had failed. 2. That after defendant had discovered the unsoundness of the horse, he had requested *C.* to select an appraiser, which he refused to do, and that defendant then had said horse appraised, and tendered to *C.* the amount of such appraisement, and now brings the same into Court, &c. The defendant also filed a paper stating that he waived the general denial put in by statute, and all matters of defense, except those by him specially pleaded. Held, that the general denial which is put in by statute, without pleading, before justices of the peace, may be waived by the defendant by putting his waiver of record.

Held, also, that the defendant, having expressly waived the general denial, was entitled to open and close the case.

Held, also, that by moving to dismiss *C.* as a party to the suit, the defendant waived any rights that might have accrued to him if *C.* had remained a defendant, and *C.*, by submitting to be thus dismissed, without objection, would be as fully concluded by the judgment as if he had continued a party to the record.

Held, also, that there was nothing in the writing to prevent proof being

made of a warranty of the horse, but when a warranty was once established, the contract prescribed the remedy for a breach, viz., by deduction from the amount of the note, and neither party could insist upon a return of the horse.

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PEARSON.

Instructions given or refused by the Court below, to which the counsel of the party objecting has appended an exception, by writing thereon "given and excepted to," or "refused and excepted to," signed by counsel, can not be regarded as part of the record unless signed by the judge also.

APPEAL from the *Wabash* Circuit Court.

Thursday,
February 6.

HANNA, J.—*Pearson* executed to one *Teague*, a writing, which was by him assigned, by indorsement, to *Cross*, who sued before a justice upon it, making *Teague* a defendant also. It is as follows:

"\$87 50.

WABASH, 11 Month 30th, 1858.

"Twelve months after date, I promise to pay to the order of *Abijah Teague*, the sum of eighty-seven dollars and fifty cents, value received; without any relief whatever from valuation or appraisement laws; but should the beast prove unsound, a deduction to be made by two disinterested persons."

The defendant answered: 1. That the assignment was without consideration, and for the sole purpose of enabling the assignor to be a witness, and that he was the real party in interest. 2. Admits the execution, &c., but avers that said note was given to secure the purchase money for a certain mare obtained of said *Teague*, who at, &c., represented and expressly warranted to defendant that said mare was in sound condition, free from disease, and a good working animal, &c. Averment of unsoundness and want of value, and that the same was known to *Teague* on, &c. That, therefore, there was a failure of consideration. 3. Avers that the contract was as set forth in the complaint, and second paragraph of the answer; and that after a trial, finding the animal unsound, &c., he informed *Teague* thereof, and requested him to appoint an appraiser, &c., which he refused to do: and that on, &c., defendant caused her to be appraised, by disinterested persons, who placed her value at fifteen dollars, which on, &c., before the commencement of said suit,

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the defendant tendered to said *Teague*, who refused to receive the same. That defendant has been always ready to pay the same, and now brings it into Court, &c. 4. That after the breach of said contract, to wit, on, &c., defendant offered to return the mare, and rescind the contract, which *Teague* refused, &c.

On the first trial the jury failed to agree; on the second, verdict and judgment for plaintiff for fifty dollars; on appeal, verdict and judgment for defendant.

On the rulings in the Circuit Court many errors and cross-errors are assigned. We will notice them in the order in which they arose.

The defendant filed what he called an amendment to his defense, as follows:

"The defendant, by way of amendment to his defense, now on file, says that he admits the giving of the note sued on; that he waives the general issue allowed him by statute, and all matters of defense except those specially alleged in his answer on file."

The plaintiff thereupon moved for a judgment for the amount of his cause of action—the sum expressed in the said writing sued on—which was refused. After the jury was impaneled, &c., the plaintiff gave said cause of action in evidence, rested his case, and moved again for a judgment for said amount; which was again refused. After the return of the verdict he moved for a judgment, for said amount, on the pleading, notwithstanding the said verdict, which was likewise refused. And he now insists that the several special answers filed were nullities, because the defendant could give in evidence the matters, thus pleaded, under the general denial, which was in by statute in the Justice's Court. That having thus voluntarily waived the benefit of said statutory denial, and admitted the execution, &c., of said writing, which was the cause of action—the complaint—it amounted to an admission of the plaintiff's right to recover.

The statutes upon which the plaintiff builds up this theory are §§ 34 and 67 of the Justice's Act, 2 R. S., pp. 455 and 463. The first is as follows: "All matters of defense, except

the statute of limitations, set-off, and matter in abatement, may be given in evidence without plea," &c. Nov. Term, 1861.

The other section provides, that on appeal the case shall be tried under the same rules and regulations prescribed for trials before justices, and amendments of the pleadings may be made on such terms, &c., as the Court may order.

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PEARSON,

The plaintiff's interpretation of these statutes would preclude a defendant from filing any answers, unless in reference to the matters excepted in said § 34, and compel him to rely upon his statutory privilege of giving evidence without pleading, as to all matters other than those excepted.

We are not of opinion that the word, "may," as used in § 34, is synonymous with "shall, and should be understood to operate imperatively; but rather think a party may plead, if he desires to do so, or may rely upon the statutory right to proceed without pleading. The provision of the statute is clearly for the benefit of the defendant. He may accept it or not. He will be presumed to have accepted it unless the contrary is shown. Here, it is shown that he placed upon record an affirmative waiver of any rights under it. This we think he could do. The answers on file were affirmative, and in avoidance of the plaintiff's right to judgment; and, therefore, plaintiff could not have such judgment until they were in some manner disposed of. There was no effort to get rid of the same by motion or demurrer, and it only remained to proceed with a trial of the questions of fact presented. In this connection we might advert to the fact that the appellee complains here, by cross error, that he was not permitted to open and close, by producing evidence and offering argument. This he was entitled to do, under the issues: without evidence the plaintiff would have had a right to a judgment. The defendant had to produce it, to prevent such result, and was, as a matter of course, therefore, entitled to commence.

Upon motion of *Pearson*, the name of *Teague* was stricken out as a defendant. Plaintiff assigns this ruling as error. It is insisted that the instrument was not assignable by statute, so as to enable the assignee to sue, without making the assignor a party to answer, &c. On the other hand, it is urged that, as the record shows that *Teague* was a party, in

Nov. Term, 1861. *CROSS v. PHARSON.* Court, he alone could be injured by, or complain of, the ruling, and he does not do so. We think that if this was an instrument, assignable like a promissory note, then *Teague* was not a necessary party, and, for any thing appearing in the record, his name should have been stricken out; if it could be assigned only as in equity, like an open account, then he was a necessary party, for certain purposes, namely, that he might protect his own interest, if he had any; and that the defendant might be protected on certain questions of testimony. See *Swails v. Coverdill*, and authorities cited, *ante*, p. 337. By moving to strike out his name, as a defendant, the other defendant would be presumed to thereby, voluntarily, waive any rights accruing to him by *Teague's* remaining a defendant; and we think that he, by voluntarily submitting to be removed from the position which he occupied, acquiesced in the plaintiff's claim to be the real party in interest, and would be as fully concluded by the judgment as if he had remained a party to the record until the final decision.

It is next insisted that the Court erred in admitting parol evidence of the terms of the contract of sale, because the writing sued on was a special contract, and should be presumed to contain the agreement between the parties. If the suit had been upon a simple promissory note, the defendant could have shown the consideration thereof, and, if for the purchase of property, that it had failed because of a breach of a warranty of the same; although the promise to pay was, so far as the note showed, positive and unconditional. But, upon showing an apparent breach of the warranty, certain legal rules would have intervened, some for the benefit of the defendant, others for the protection of the plaintiff; among the latter, perhaps, might have arisen a presumption, that certain patent defects were not warranted against.

The instrument sued upon was a promissory note, in 'the usual form, with these words added, "but should the beast prove unsound, a deduction to be made by two disinterested persons."

The evidence shows that the note was not delivered to the payee for several days after the contract and delivery of the

animal, and that in the mean time a defect was apparent. Keeping in view this fact, we are of opinion that the defendant was authorized to introduce evidence to show: 1. To what animal the word "beast," as used, applied. 2. That the word "prove," as used, implied that there was to be a test or trial of the animal in reference to some point then in view, or generally, and, consequently, a reasonable time should elapse for such trial; depending, as to duration, upon the question to be determined. 3. Either party had a right, by evidence, to place the Court in possession of the facts, the circumstances surrounding the parties, at the time of the execution of the writing, to enable it to determine whether a deduction was to be made for any and all unsoundness, patent and latent, developed upon said test, or to some particular unsoundness, only, namely, that which was latent.

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As to proof of warranty and breach thereof; if such existed, the defendant, if the contract did not change his rights, could: 1. Rescind the contract by returning the animal in a reasonable time, &c. 2. Or he could retain the animal and sue for a breach of the warranty. 3. Or set up the facts in reduction of the damages in a suit on the contract. 4. And, perhaps, (a point we need not decide) might fix the amount of the reduction, under certain circumstances, by selling the property.

We do not perceive any thing in the writing to prevent the proof of a warranty on the sale; but if such existed it prescribed the remedy of the parties upon the breach. They were not remitted to the general principles above stated as to such remedy. Neither the one party nor the other could insist upon a return of the "beast," but the defendant should retain it and a deduction should be made from the price to be paid.

Perhaps there is another sufficient answer to the objection, and that is, that the evidence was directed to the questions of fact raised by the answers, whether properly or improperly, was not made a question on the pleadings.

It is not insisted that the evidence of the value of the animal should have been confined to the time of the sale. The Court permitted each party to give evidence of the

Nov. Term, value at the time of sale, and of the trial, and various inter-
1861. mediate times.

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It was shown that the defendant offered to return the animal in about a month, or that the parties should choose persons to fix the amount to be paid by him; and once or twice, not long afterward, the same propositions were made by him. That *Teague* refused to rescind, or to have any thing to do with the appraisal of the animal; but requested the defendant to further try said animal, and to try to cure her.

By the very terms of the contract a deduction was to be made from the contract price if the animal proved unsound. There is nothing in the contract nor in the evidence, if such fact could in that manner have been shown, fixing any other time for such deduction than the maturity of the contract for the purchase money; at the maturity thereof, the defendant caused persons to examine the animal, fix a value, and on the trial to testify to that fact. The evidence of defendant as to the value, at the end of a reasonable time to test her in, corresponded in substance with the amount fixed by the appraisers called. That of the plaintiff agreed as to her value, at the time of the sale, and at the time of trial, though the sum fixed by plaintiff's witnesses was greater than defendant's. He did not, to such an extent, appear to direct his attention to the time of the offer to return, or the maturity of the debt. Perhaps the true interpretation of the contract, as it related to a future determination as to a reduction, should have been, that at the maturity of the note the persons chosen, if the parties carried out that provision, should have looked to the value of the animal when sold, during the intervening time, and at the maturity of the debt, to arrive at a conclusion as to the amount of the reduction then to be made. As the conclusion of those who were selected by the defendant for that purpose corresponded with the verdict of the jury, we need not now inquire as to which should have prevailed if there had been a difference; nor whether the appraisal was at all binding on the plaintiff.

The last question made by the appellant is as to the rulings on instructions. The appellee objects that the

instructions are not before the Court in a form to authorize their consideration.

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A part of the instructions asked by the plaintiff have appended to them the words, "Refused and excepted to," signed by counsel; and a part asked by defendant the words, "Given and excepted to," and likewise signed by plaintiff's counsel. They do not appear to be authenticated by the signature of the judge, nor are they embodied in the bill of exceptions. It is difficult to understand from the record whether the instructions were spread upon the order book or not. As the statute, 2 R. S., p. 119, only requires them to be filed, after being signed by the judge, and not to be entered at large, even on the final record, unless either party may wish to remove the cause to a superior court, we can not indulge the presumption that they were entered on such order book. As the fact does not plainly appear to be so, we are not called upon to decide whether, if they were so entered among the day's proceedings, the signature of the judge to the said proceedings in the order book would be such signature to the instructions as the statute quoted requires.

As the statute only requires them to be filed to become a part of the record, we can not agree with the appellant that the signature of counsel, as above set forth, is sufficient to constitute them matters of record when so filed. A moment's reflection would show the evil that might result in permitting a party, or his attorney, to make a record for the Court, instead of the Court making the same.

We are of opinion, therefore, that the instructions formed no part of the record until signed by the judge in some form, and should not have been incorporated into it by the clerk.

Per Curiam.—The judgment is affirmed, with costs.

Orris Blake, S. H. Goodwin and T. C. Whiteside, for the appellant.

D. D. Pratt and D. P. Baldwin, for the appellee.

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1861.

OWEN and Another v. RYNERSON.

OWEN
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RYNERSON.

Before a witness can be impeached by proof of contradictory statements made out of Court, he must be inquired of as to such statements, after having his memory refreshed as to time, place and person.

Thursday,
February 6.

APPEAL from the *Hendricks* Common Pleas.

HANNA, J.—The appellants sued the appellee for the alleged seduction of *Sarah Conner*, the daughter of the female appellant. Answer, general denial. Trial; verdict as follows: "We, the jury, agree to find for the defendant." Over a motion for a new trial, there was judgment for the defendant. Two points are presented upon the rulings of the Court, in refusing to admit, and in the admission of evidence.

First. The plaintiffs offered to prove the number, age and sex of their children, which was not permitted. We are cited to 2 Greenl. Ev., § 579, and authorities there noted, as authorizing such proof. If the authority cited justified the introduction of the evidence, it was in reference to the question of damages; and as the judgment was for the defendant, we are not able to see any effect the evidence, if admitted, should have had upon the mere question of guilt. The ruling, even if erroneous, should not, therefore, reverse the judgment.

Second. During the progress of the trial, one *Roach* was permitted, on behalf of the defendant, to testify, over the objection of the plaintiffs, that *Sarah Conner* had told him that defendant was not the father of the child. *Sarah Conner* had not been asked in reference to this conversation, when testifying.

For the illicit connection which had taken place, if any, between the said *Sarah* and the defendant, the plaintiffs were not entitled to recover any damages, unless they could show the same to have resulted from said act. Therefore, the evidence was permitted of others who may have had connection with her about the time the child was begotten; from the gestation and delivery of which, the loss of service,

&c., arose. Two witnesses testified to the commission of acts of illicit intercourse, about that time, with said *Sarah*. She testified to such act, with the plaintiff, and that he was the father of the child. As to the perpetration of the act, she was, to some extent, corroborated by another person, who witnessed it. Under the circumstances it was, therefore, proper that she should have been asked as to the alleged statement to *Roach*, even if such was not the general rule as to impeaching evidence by contradictory statements made out of court.

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NICKWANGER
v.
BEVARD.

The plaintiffs had shown a loss of service, &c., because a child had been begotten. Who was responsible for such loss of service? It appeared, from the evidence, that some one of these men were. The mother of the child said it was the defendant. The other two men said, in effect, perhaps so, but we had an equal chance. The defendant then showed her statements that it was not his. Before he should have done this, the witness should have been called upon, after having her memory refreshed as to time, place and person, to make her statement in reference to such conversation.

It is objected that the jury did not return a verdict, only agreed to do so. We think that there is nothing in this objection.

Per Curiam.—The judgment is reversed, with costs. Cause remanded, &c.

C. C. Nave and *J. Witherow*, for the appellants.

NICKWANGER v. BEVARD.

Suit upon a promissory note. Answer: 1. That said note was given in compromise of a pending prosecution for bastardy, fraudulently instituted by the plaintiff against the defendant, in which she falsely represented that defendant was the father of her child; and that the consideration of said note had failed, in this, that subsequently to the giving of said note, it was agreed between plaintiff and defendant that if said child was not born

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BEVARD.

before a given time, that said note should be delivered up and canceled, and that said child was not born before the said time limited.

2. That said note was obtained by fraud and false representation, in this, that the same was given in compromise of a prosecution for bastardy, in which plaintiff fraudulently and falsely charged the defendant to be the father of her child, she well knowing that one *A. B.* was the father of said child.

Held, that so far as the first paragraph of the answer averred a want of consideration, it was bad.

Quære: Whether the consideration shown in the first paragraph of the answer for the alleged agreement to surrender the note was sufficient, and if so, could such agreement be set up as a defense to the action on the note.

Held, also, that the second paragraph of the answer was good.

Thursday,
February 6.

APPEAL from the *Grant* Circuit Court.

HANNA, J.—Suit on notes, and to foreclose a mortgage. Answer: 1. Want of consideration, in this, that said notes, &c., were executed in a compromise of a pending prosecution for bastardy, fraudulently instituted by said *Bevard*, and in which she falsely represented that defendant was the father of the child of which she was then pregnant, and that said consideration had failed, in this, that sometime afterward, another agreement was made, independent of the first, that if the child was not born by the 10th or 20th of *July*, said notes and mortgage were to be delivered up to be canceled, and that it was not born on, &c. 2. That said notes were obtained by fraud and false representations, &c., setting up the same facts contained in the first paragraph, and that the father of said child was well known to plaintiff to be one *A. B.* 3. Accord and satisfaction. 4. That one *Jonathan Bevard*, is the real owner of said notes, &c. 5. That by agreement, said notes, &c., were surrendered to be canceled; but the possession thereof was wrongfully resumed. 6. plaintiff is not the owner of said notes, &c., the same having been delivered up and canceled.

A demurrer was sustained to the first and second paragraphs of the answer, and overruled as to the others.

Upon the ruling in sustaining the demurrer, the first question now arises as to the ruling in refusing to sustain the demurrer as to the other paragraphs, because there are no

cross-errors assigned. There was no motion to strike out any part of said first paragraph. Nov. Term,
1861.

In reply, a denial to each remaining paragraph of the answer was filed, and as to the third, a further reply was filed, that the payment made was a sum of money agreed, in the compromise, to be paid by defendant to the attorney of plaintiff in the bastardy case. The points made by the appellants are: NICKWANGER
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1. Upon the ruling of the Court in sustaining demurrers to the first and second paragraphs of the answer, and in overruling the demurrer to the second paragraph of the reply to the third paragraph of the answer.

2. Upon the ruling in excluding evidence.

3. Upon the ruling on the motion for a new trial.

As to the third point, it is based upon the alleged insufficiency of the evidence; but as the record does not profess, under the rule, to contain all the evidence, we can not notice it. As to the second point, the evidence excluded was applicable to defenses demurred to; the whole question is, therefore, presented on the rulings on demurrers, even if there had been other issues under which the evidence could have been offered. This leaves the first point alone to be considered.

In 1 Parsons on Contracts, pp. 363-364, it is said that "with the courts of this country, the prevention of litigation is not only a sufficient, but a highly favored consideration; and no investigation into the character or value of the different claims submitted, will be entered into for the purpose of setting aside a compromise, it being sufficient if the parties entering into the compromise, thought, at the time, that there was a question between them." Several cases are cited, in a note to sustain the text; the strongest of which, perhaps, is *O'Keson v. Barclay*, 2. Penn. 531, in which an action for slander was compromised by the defendant agreeing to give a certain sum to the plaintiff; it was held that there was a sufficient consideration for the promise, although the words laid in the declaration were not actionable, *Corode v. McKelvy*, Addison, 56; *Stoddard v. Mix*, 14 Conn. 12; *Barlow v. Ocean Ins. Co.*, 4 Met. 270; *Ex parte Lucy*, 21

Nov. Term, 1861. E. L. & Eq. R. 199; *Mills v. Lee*, 6 Monr. 91; *Russell v. Cook*, 3 Hill, 504; *Stewart v. Ahrenfeldt*, 4 Denio, 189; *Bullock v. Ogburn*, 13 Ala. 346; *Watterman v. Barratt*, 4 Harring. 311.

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We are of opinion, therefore, that, so far as said first paragraph of the answer averred a want of consideration, &c., it was bad, in the light of the decisions and authorities above quoted; but perhaps this Court held a somewhat different view in the case of *Jarvis v. Sutton*, 3 Ind. 291; and therefore, as the judgment will be reversed upon another point, we will pass this. As to the further averment in said first paragraph, there is nothing showing the consideration inducing the promise to deliver up, &c. said notes, &c., if any existed, unless the compromise and execution of said notes was a sufficient precedent consideration, or the then agreement, that if the child was not born by a fixed day, imported a sufficient consideration. Perhaps the presumption would arise that the parties knew the law in reference to the period of gestation, and the facts, better than any one else, upon which the charge was predicated and suit instituted, a compromise of which was the consideration for the execution of said notes, &c. Under these circumstances could they, after such compromise, make a valid agreement, resting upon these considerations, whereby the notes were to be discharged in the event the child was not born until after the time agreed upon? If such agreement was valid, could it be set up as a defense to an action on the notes, &c.?

As to the second paragraph of the answer, it appears to us, in view of the authorities above cited, and the case of *Spahr v. Hollingshead*, 8 Blackf. 416, to be sufficient.

Per Curiam.—The judgment is reversed, with costs. Cause remanded, &c.

J. Van Devanter and *J. F. McDowell*, for the appellant.
R. T. St. John, for the appellee.

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1861.

HITCHENS v. RICKETTS and Another.

HITCHENS
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RICKETTS.

A. being the owner of certain lands, gave a written power of attorney to *B.*, authorizing him to sell, assign, transfer, trade and dispose of said lands, either for cash or in exchange for other property. He was to continue to act as such attorney for eighteen months, and to receive for his services one half of all he might make out of said property over a certain price, and where other property was taken in exchange, the compensation was to be determined by getting other persons to estimate the value of the property so taken. *B.* having by an exchange procured a certain mill property, rented the same to *C.*, who was dispossessed by a lessee of *A.*, on the ground that *B.* had no authority to rent said lands. Suit by *C.* to recover possession.

Held, that as the evidence as to the authority of *B.* to rent the premises was conflicting, it was competent for *C.* to prove that *B.* had acted as the agent of *A.* in renting other lands taken by him in exchange under his power of attorney.

Held, also, that under the letter of attorney, *B.* had such a power, coupled with an interest, as gave him authority to rent, at least until such time as he and his principal should close their accounts.

APPEAL from the *Switzerland* Circuit Court.

HANNA, J.—*Stewart & Brother*, of the State of *Ohio*, owned certain lands in *Stark* county, *Indiana*. On *November* 12, 1858, they appointed, in writing, one *Carroll* their attorney in fact, "to sell, transfer, assign, trade and dispose of said lands, either for cash or in exchange for other property." He was to continue such attorney for eighteen months, and "receive as a compensation for his said services one half of all the profits that he may make and realize on said lands after deducting three dollars per acre as the value of said lands." It was further stipulated that if *Carroll* traded for other property, about the price of which a difference should arise "so as to fix the compensation of said attorney," then each was to choose a man to determine the same.

Thursday,
February 6.

It is shown by the evidence in the case at bar that *Carroll* effected exchanges of said lands, or a portion thereof, for certain lands and town property in *Switzerland* county. The appellant claims that he rented one piece of said last named lands from said *Carroll*, with a water, saw and grist mill thereon, for an indefinite period of time, and had

Nov. Term, 1861. occupied the same from *May* 1, 1859, until *January* 9, 1860, when he was unlawfully dispossessed of the same by the

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appellees, who, on the day last aforesaid, unlawfully entered upon the same, and so retained possession thereof.

The defendants claimed the right to enter under a renting from one *Titus*, the agent of the *Stewarts*, who disavowed the renting by said *Carroll*, and his right to bind them in that respect.

It is said the Court erred in rejecting evidence, and in refusing a new trial.

The suit was commenced before a justice, where the plaintiff had judgment; on appeal the defendants had judgment for costs.

The evidence offered by the plaintiff and rejected, was agreements of renting or leases, made by *Carroll* to other persons, for parcels of said lands, &c. obtained in exchange as aforesaid, and the oral testimony of one *Crall*.

As to the first error, the evidence of the plaintiff showed a renting, for an indefinite time, of the property to him by *Carroll*. The defendants proved by the *Stewarts* that they had not authorized *Carroll* to rent the property, and disavowed the act. The plaintiff then offered the leases made by *Carroll* to others as a circumstance, as the bill of exceptions states, to be considered, with other testimony that might be given, tending to prove that *Carroll* had the right to rent, &c. The evidence was rejected.

The plaintiff had proved by ample testimony, namely, a copy of the power of attorney, title bonds, deeds, &c., that said *Carroll* was the acting agent of said *Stewarts* in buying, exchanging and selling real property, and that he had traded for the property, the occupancy of which is in dispute. It was also in evidence that plaintiff had written to *Stewarts* in *October*, notifying them that the contract of the agent as to repairs was not complied with, and that one of said *Stewarts* was out in *November* at the property, but did not see plaintiff, nor notify him that the agent had not authority to rent; it is true he requested *Titus* to inform him, but the time when he did so is uncertain, whether within three weeks thereafter, or not until about the time plaintiff was

dispossessed. It was also in evidence, by the testimony of *Schoonover*, from whom the property was obtained, that *Stewart* was out in *March*, 1859, examining it, and informed him that he was to deliver possession thereof to *Carroll*, who was to sell or rent the same, or do the best he could with it.

Taking all these circumstances together, we are of opinion that they exhibited such a contradiction of the evidence of the *Stewarts* in reference to the authority, in point of *fact*, of said *Carroll* to rent, that the proof offered should have been received.

Stewart, when testifying, was asked whether at a certain place and time, and to a certain person, he had not stated that *Carroll* was to have the mills repaired. He denied making such statement. A witness was offered to prove that he did. The evidence was not received. If it was material, it should have been heard. It was offered to show the general charge *Carroll* had of the property. Was it proper? We think the evidence should have been admitted. It would have tended to establish the fact that *Carroll* had the general superintendence of said property.

But there is a question back of all this, namely, whether *Carroll* had not such a power, coupled with an interest, as gave him authority to rent, at least until such time as he and his principal should close their accounts. It was shown they had not settled; nor had the period for which he was appointed as attorney, expired. If this proposition is true, then a new trial should have been granted. Had he such interest as authorized the renting? We think he had under the circumstances.

Per Curiam.—The judgment is reversed, with costs. Cause remanded, &c.

John Dumont, for the appellant.

Scott Carter, for the appellee.

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v.
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THE CITY OF INDIANAPOLIS v. SKEEN and Others.

THE CITY OF
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v.
SKEEN.

On August 18, 1856, the common council of the *City of Indianapolis*, adopted a resolution by which *S.* was appointed the agent of said city to negotiate certain city bonds, at a rate not less than ninety-seven cents on the dollar, and the mayor of the city was directed to take proper security from *S.* for the discharge of the trust. *S.* accepted the trust, and on the same day executed his bond with securities, conditioned that he should well and truly execute said trust, and pay over to the city all moneys that might come to his hands, as such agent. The bonds of the city to the amount of \$25,000, were then placed in the hands of the agent. Afterward, on September 2, of the same year, the former resolution of the council was so far modified as to authorize the agent to negotiate said bonds at a rate not greater than an interest of ten per cent., and again on October 6 the council modified their former instructions by authorizing the agent to make a loan of \$20,000 for two years, by hypothecation of \$25,000 of bonds. Suit by the city on the bond, alleging that on September 27, 1856, *S.*, in violation of his said trust, borrowed the sum of \$5,000 at thirty days, at seven per cent. interest, and to secure the same, hypothecated \$21,000 of said bonds; that said agent wholly failed and refused to pay over said \$5,000 to the city, and in consequence thereof, and to prevent loss, the city was forced to pay, and did pay, said \$5,000, with a large amount of interest and expenses, &c.

Held, that *S.* having, by his misconduct, obtained the money by a pledge of the bonds of the city, was responsible to his principal for the loss sustained on account of such misconduct, and whether the bonds were properly or improperly pledged in the first instance can not be inquired into by the agent, as his act was so far adopted by his principal as to redeem the bonds pledged by him.

Held, also, that the question as to whether the city council transcended its powers in issuing the bonds can not be inquired into in this action either by the agent or his sureties.

Held, also, that those dealing with the agent, were not compelled to look to the records of the council either for the appointment or instructions of the agent, since they were not necessarily of record.

Held, also, that the city having adopted the act of the agent, by paying the note given by him, the mouths of the agent and his sureties were closed from denying the power of the agent to do the act and receive the proceeds of it, when called upon by his principal for such proceeds, by a suit upon the bond.

Held, also, that there was nothing in the bond sued on, requiring the performance of an illegal act, as the resolution appointing the agent did not necessarily require a sale of the bonds at a usurious rate of interest.

Held, also, that as the second resolution passed by the council after the

original resolution of appointment was not acted upon by the agent, and as the third resolution was passed after he had borrowed the money sued for, they could not affect the liability of the sureties by any supposed change in the duties of their principal.

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THE CITY OF
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v.

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APPEAL from the *Marion* Circuit Court.

HANNA, J.—It is averred in the complaint that, “on *August* 18, 1856, the common council adopted a resolution as follows: *Thursday, February 6.* “Resolved, that *Jeremiah Skeen* be, and he is hereby appointed, agent of the *City of Indianapolis* to negotiate a portion of the city bonds authorized to be issued by the city, at a rate not less than ninety-seven cents to the dollar, and that his expenses be paid by the city, the mayor of the city taking the proper security for the proper discharge of the trust.” And further, that *Skeen* accepted the appointment, and executed the bond sued on, together with the other defendants as his securities, conditioned “that the said *Skeen* was this day appointed agent of said city, &c., to negotiate the bonds of the city, aforesaid. Now if said *Skeen* shall well and truly execute said trust, and pay all moneys that may come to his hands, as such agent, to the city,” &c. And that bonds were delivered to said *Skeen*, numbering from one to twenty-five, for one thousand dollars each, and being each of the same tenor, payable to *Nathan B. Palmer*, or bearer, and bearing interest at six per cent. from date, payable semi-annually, on the first of *January* and *July*, on presentation of the coupons attached, until payment of the principal sum, which was on a credit of two years, &c. The bond sued on was dated on the same day the above quoted resolution was adopted.

It is further averred that on *September 2*, said resolution was by the council so far modified by another resolution, as to empower said *Skeen* to negotiate said bonds at a rate not greater than an interest of ten per centum per annum; and that afterward, on *October 6*, 1856, the council adopted a resolution directing said *Skeen* to complete his arrangement for a loan for \$20,000, principal and interest to be paid at the periods named in said bonds, &c., on hypothecation of \$25,000 of said bonds. That so much of a former resolution as relates to the times upon which said loan was to be effected, be and is repealed.

Nov. Term, 1861. It is further averred that said *Skeen*, in violation of his said trust, and the directions of said city, &c., did on *September 27, 1856*, borrow of, &c., the sum of \$5,000, for which he executed a note, payable at thirty days after date, with seven per cent. interest, dated and payable at *New York*, and that by the laws of said State, said rate of interest was legal; and signed said note, "*City of Indianapolis, Indiana, by J. D. Skeen, Agent;*" and to secure the payment thereof, hypothecated with the payees of said note said bonds of said city to the amount of \$21,000, which, by the terms of said note, upon the non-payment thereof at maturity, the said, &c., were authorized to sell without notice; that *Skeen, &c.*, failed, &c., to pay over said \$5,000; that to obtain a release of said bonds, plaintiff paid to, &c., said \$5,000, as well as \$500, interest, and the further sum of \$500, expenses, &c.

There is a second paragraph, similar to the first in its averments as to the appointment, &c., of *Skeen*, and as to the resolutions adopted, &c. It then avers that said *Skeen* did not well and truly discharge his said trust, but in violation of said instructions, &c., borrowed of certain bankers, &c., the sum of \$5,000, and for the purpose of procuring said loan, falsely and fraudulently represented to, &c., that said city had a debt maturing, &c., and that unless he procured said sum, plaintiff's credit would be lost; whereas, in truth, said plaintiff had no such debt, &c. That he executed said note as agent, but, in fact, without authority, and for his own benefit, &c. Averment of pledge of bonds, &c., and that *Skeen* fraudulently converted said money to his own use, and falsely represented that the said bonds were deposited for safe keeping, &c. That he has wholly failed to pay, &c.; and that the city has paid, &c., to release said bonds, &c.

The defendants severally demurred to the complaint, and to each paragraph, because, as averred by *Skeen*, the same did not state facts sufficient, and because it was shown by said complaint and bond that the same was executed and delivered to secure the performance, &c., on the part of said *Skeen*, of an act and business wholly illegal and void, &c.; that if the city paid any money on account, &c., the same

was paid of its own wrong, and not on account of any act of defendant. The securities assigned the same causes of demurrer; and, also, that the bond sued on was given, inasmuch as said *Skeen* had that day been appointed, &c., to negotiate said bonds, being made under the resolution of August 18, in which the duties of said agent were fixed. That a subsequent resolution imposed new and different duties on said *Skeen*, and withdrew the power conferred by the former, and gave said *Skeen* power, simply, to hypothecate bonds; that they are liable, if at all, only for any default under the former resolution; whereas said suit is for a failure, &c., under the latter resolution, &c.

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The demurrers were sustained, and the plaintiff failing to amend, there was judgment for the defendants.

Questions are raised here: 1. On the power of the city to issue, &c., bonds. 2. On the legality of a contract at the rates mentioned, &c. 3. On the right of an agent to avail himself of the illegality, if any, of the contract. 4. In reference to the effect of the action of the council, subsequent to the execution of the bond sued on, as bearing upon the liability of the securities.

The statute we are pointed to, as authorizing said proceeding, is 1 R. S., § 80, p. 220, and reads as follows: "Loans may be made by a vote of two thirds of the common council, in anticipation of the revenue of the current and following year, and payable within that period; but the aggregate amount of such loan in any one fiscal year shall not exceed the levy and tax authorized by this act, for the municipal expenses for the same year."

It appears from the pleading that the action of the council, authorizing a loan, and the issue of bonds, had occurred previous to the first resolution quoted, perhaps in *July*, but the order made, or proceeding had, upon that occasion is not in the record. So we are not informed whether there was a vote of two thirds of the council; whether the loan was in anticipation of the revenue of that and the following year; nor whether the amount was within the aggregate of the levy, &c., for that year. Was it necessary to comply with these provisions of the statute, and if so, should we

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It is not necessary, in this action, for us to examine the rights acquired by the holders of the bonds, nor the power and liabilities of the city council, in issuing, &c.; it sufficiently appears from the pleadings that *Skeen* was appointed agent of the city to borrow money for its use; and that he obtained \$5,000, and failed to pay it over. If he exceeded his authority and thus obtained the money, or even by misconduct, he is responsible to his principal; providing that principal suffer loss by his act. It is shown the loss was suffered, in this, that money had to be paid in discharge of the note given, and to recover possession of certain bonds pledged. Whether the bonds were properly or improperly pledged, in the first instance, can not, in this action, be inquired into by the agent, because the act was so far adopted by the principal as to advance the money to redeem, as stipulated by him. Nor is it a subject of inquiry, in this action, by either the agent or his securities, whether the council transcended its powers in issuing said bonds. They were issued and placed in his hands, under such instructions as they saw proper to give. Those dealing with him were not compelled to look to the records of said council for either his appointment or instructions, because they were not necessarily of record there. Bonds were passed out of his hands, under these circumstances, and a note executed, whether properly issued or not, and whether so passed, under and within said instructions or not, can not be a material inquiry, when it is averred that to save the credit of the city, and keep themselves harmless, from the acts of said agent, his principal was compelled to and did pay large sums. Story on Agency, § 217; *The People v. Norton*, 5 Seld. 179; *Supervisor of Rensselaer Co. v. Bates*, 3 Smith, (N. Y.) 242.

The appellees next insist that the appellant was not obliged to pay to, &c., the sum stipulated by *Skeen*, in the note, &c., and that said appellant could not by electing to pay, in the absence of a legal obligation, create a liability on the part of appellees to said appellant.

This is placing the payment made by the city in the light

of a voluntary payment. If we are correct in the conclusions arrived at above, we do not see how the appellees could avail themselves of the question here attempted to be raised. The agent had used the securities placed in his hands to raise money upon, perhaps, not strictly in the mode, nor to the amount, anticipated by the principal; but still the principal adopted the act by making the payment, according to the stipulations of the agent; and it appears to us that the mouths of the agent and his securities are closed from denying the power of the agent to do the act and receive the proceeds of it, when called upon by his principal for such proceeds, by a suit upon the bond given for the performance of his duties. But it is said the bond itself can not be the foundation of an action, because it is void, in consequence of having been made to secure the performance of an illegal transaction, namely, a usurious contract.

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Whether, in the further progress of the proceedings, facts can be shown that would establish the propositions advanced we need intimate no opinion; but certainly such fact is not shown by the bond itself; that was to secure the performance of the duties of an agent in negotiating certain securities of the principal. His business was to discharge the duties of an agent, and pay over the proceeds of his negotiations. The bonds placed in his hands bore interest at the rate of six per cent. By the resolution of his appointment, he was limited in his negotiations to a rate not less than ninety-seven cents to the dollar. He might have negotiated at par. It was not a fixed fact that they were to pass out of his hands upon usurious terms. But even if the instructions were to that effect, it is questionable whether they would render the bond sued on invalid. There was no designated place where the duties of the agent were to be discharged. In this State a suit upon a note, bearing a usurious rate of interest, can be maintained so far as to recover the principal. The contract that might be made at such a rate would not, therefore, be in all respects invalid. But without giving an opinion upon the point, it is only necessary to say that there was nothing in the bond sued on requiring the performance of an illegal act; and, keeping in view the place where the loan was made, and the rate of

Nov. Term. interest averred to be legal there, and that agreed to be paid,
1861. we do not see that there was any usury in the contract.

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v.
RICHTER.

These observations appear to us as sufficient upon the three first propositions; as to the fourth, the pleadings do not show that any instructions given by the city, after the appointment of *Skeen*, were acted upon by him. By the second resolution he was authorized to negotiate at ten per cent.; he did not do it, but at seven. The third resolution, it is urged, so far changed his duties as to release his securities. It should not have any effect, because it was not adopted until after the agent had acted; and can not, therefore, be presumed to have influenced that action.

Per Curiam.—The judgment is reversed, with costs. Cause remanded, &c.

B. K. Elliott, for the appellant.

J. Morrison and *C. A. Ray*, for the appellees.

WALDO and Another v. RICHTER.

Suit on a note and to enforce a mechanic's lien. The note was executed by *W.*, but the complaint averred that it was given for work performed and materials furnished at his request, as agent for his wife, in the erection of a house on her property. The defendants answered separately: *W.* by denial and payment; his wife by denial, and that she was a married woman, the wife of *W.*; that the premises described were her "own individual property, in her own right, in fee, and not liable for the payment of *W.*'s debt, being the claim sued on." The plaintiff replied to the second paragraph of the answer of *W.*, and demurred to the second paragraph of the wife's answer. Trial, and finding for plaintiff against both defendants; order of sale, &c., without any disposition of the issue of law raised by plaintiff's demurrer.

Hell, that as to the wife the proceedings were erroneous, as the issue of law should have been disposed of before the trial of the issues of fact.

Thursday,
February 6.

APPEAL from the *Marion* Common Pleas.

HANNA, J.—Suit on a note and to enforce a mechanic's lien. The note was executed by said *Waldo*, but it is

averred that it was made in consideration of work done and materials furnished, at his request, as the agent and husband of, &c., in the erection of a building on, &c., the property of said wife.

The defendants answered separately: by *Waldo*, denial and payment; by his wife, denial, and that she was a married woman, the wife of said *Waldo*; that the premises described, &c., are her "own individual property in her own right, in fee, and not liable for the payment of the debt of *Wa'do*, being the claim sued on."

The plaintiff replied to the second paragraph of *Waldo's* answer, and demurred to the second paragraph of his wife's.

There does not appear to have been any disposition of the issue of law. The issues of fact were tried by the Court; finding and judgment for the plaintiff, against both defendants, and that the property be sold to satisfy said lien.

As to the female defendant, the proceedings appear to have been erroneous. The issues of law should have been disposed of before the trial of the issue of fact. *Gray et al. v. Cooper*, 5 Ind. 506; *Kegg et al. v. Welden*, 10 Ind. 550. Indeed the issues of fact were not ready for trial. If the demurrer had been sustained the answer might have been amended until it would have tendered a material issue of facts. If the paragraph of the answer had been considered bad, still the demurrer might have searched the pleadings further for a defect to have rested upon, and thus have enabled the defendant to test the validity of the complaint.

Per Curiam.—The judgment, against the female defendant, and as to the lien, is reversed, as to *Waldo*, it is affirmed, at the costs of the appellee.

T. D. & R. L. Wa'pole, for the appellant.

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RICHARDS and Others v. RICHARDS.

RICHARDS
v.
RICHARDS.

Suit by a widow for partition of the lands of which her husband died seized, and which by his will he attempted to dispose of to his minor children, who were made defendants. A guardian *ad litem* was appointed for all the minor defendants but one, who had not been served with process, but whose testamentary guardian had been served. Answer by the guardian *ad litem*, that the plaintiff was not entitled to any share of said lands, because of an ante-nuptial agreement, and of the execution of said will, by the husband, disposing of said land. The agreement pleaded provided that the husband was to have the right to dispose of his lands, by will or otherwise, as he might please, provided that if he died first his wife was to be provided with a home and a support on the home farm during her life, and also to have what might remain of any property she might bring to him, she taking care of his children while they were willing to stay with her. Another clause provided that the wife should take care of said children, or cause them to be taken care of and provided for, if the husband should die before they are able to take care of themselves, and that she should also pay the taxes and keep up the farm, &c. The will of the husband devised the land to his minor children. A demurrer having been sustained to this answer judgment was rendered for the plaintiff, without proof, for want of an answer.

Held, that it was erroneous to render judgment for want of an answer, without proof, and that the Court might have compelled the guardian to put in an answer, or in default thereof have removed him.

Held, also, that the provisions of the ante-nuptial contract were intended to, and did, exclude the wife from claiming that interest in the lands, which she would otherwise have been entitled to under the law.

Held, also, that the service of process upon the testamentary guardian was sufficient, under the statute regulating partition suits, to bring his ward before the Court.

Thursday,
February 6.

APPEAL from the Grant Circuit Court.

HANNA, J.—*Sarah Richards* brought her action to obtain partition of certain lands, of which she averred her late husband died seized, and which, by will, he attempted to dispose of to his minor children, the present appellants, who are made defendants. Said minors were defaulted, and a guardian *ad litem* appointed to defend for all of them, except one, who was not served with process, but whose testamentary guardian was served.

The guardian *ad litem* answered, admitting the marriage, seizure, execution of the will and death of the testator;

17	636
148	422
17	636
149	159

but denying that plaintiff was entitled to any part of said lands, because of an ante-nuptial contract and of the execution of said will; which contract is as follows, substantially:

"Mem., &c. between, &c., witnesseth, that in consideration hereafter mentioned, to wit: the parties propose to enter into marriage, and both owning property, it is therefore agreed by the said parties, that in consideration thereof the said *Henry Richards*, Sr., is to have the right to dispose of his lands by will or otherwise, agreeably to his own views; provided, if he dies first, the said *Sarah* is to be provided with a house and home and support on the home farm during her lifetime, and she be entitled to such property as may be left of what she brings to him; also a share of what may be laid in for the support of the family, she taking care of his children while they are willing to stay with her. It is further agreed that so much money as the said *Henry* may have over and above what may be needed for the support of the family, he is to dispose of by his will or otherwise, as to him shall seem right; whereof the said *Sarah* claims no part, and hereby relinquishes all right thereto, that is, whatever is now accumulated. And the said *Sarah* is to take care of said children, or cause them to be taken care of, and provided for, if the said *Henry* should die before they are able to take care of themselves; that is, the young children, or those by *Mary*. The said *Sarah* is to pay the taxes and keep up said farm after his death if he dies first. In witness," &c., signed, sealed and acknowledged.

By the will, the land in controversy was devised to the minor defendants, being children by the testator's second wife, *Mary*; to be divided among them when they arrive at age; and by it certain legacies, in money, were to be paid to his children by his first wife. His executor was to rent the land, keep it in repair and pay taxes. If any money was left after paying debts and legacies, &c. it was to be loaned; and, afterward, divided share and share alike among his second set of children. The will then states that, "Provided, also, and if I should die before I obtain a divorce from *Sarah Richards*, alias *Sarah Allen*, and she obtains a support from my estate, then, in that case it will be likely to consume the

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Nov. Term, rents and profits, then in that case, the farm to be rented
1861. until the aforesaid legacies are paid without having to sell
any of the lands."

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It is shown that the testator died about three years after the marriage, and averred in the answer that at his death and for a long time before, said *Sarah* had been living in the State of *Illinois*, having without any just cause abandoned said decedent, and failed on her part to comply, &c.

There was a demurrer filed and sustained to the answer; and the record proceeds to state that "defendant having failed to withdraw said demurrer or further answer, it is therefore considered," &c., setting forth the finding and judgment of the Court.

It is manifest that the judgment should be reversed, for the reason that the record thus discloses the fact that it was rendered without proof, and for failure on the part of the guardian *ad litem* to answer. After the demurrer was sustained the Court should have heard proof, as against said minors, of the allegations in the complaint; and, perhaps, that there might be an issue formed to which the same would be applicable, it rested with the Court to compel the guardian to put in an answer, at least the formal one. If he should stand in contempt, in refusing to obey the order of the Court in that respect, he could be removed, and another appointed, or other order made in regard to such contumacious act. But for such act the sacrifice of the rights of the minor defendants, which he was appointed to guard, should not be permitted, much less ordered, by the Court. So much in regard to the order of the Court in entering judgment for want of an answer.

The question remains, of whether the answer filed was sufficient. It is insisted that it was not, because the contract had reference to the remuneration which the plaintiff was to receive for maintaining the children of deceased, and that the provision therein made for her was not in lieu of any rights of property which might otherwise accrue from the marital relation.

Upon a careful consideration of the said contract pleaded, it appears clear that the deceased desired to retain the right

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to dispose of all his lands and money, then accumulated, except, that if his intended wife should survive him, she should be "provided with a house, and a support on the home farm during her lifetime." It further appears that she was possessed of property, whether real or personal, or both, does not appear. There is no provision that if he survived her, any of this should belong to deceased; but it is provided that, of such as she might bring to him, any that remained at his death, if she survived, she should be entitled to. Now, it is equally clear that this intention of the deceased, as to the disposition of his property, can not have effect, and the other contracting party, at the same time, acquire the right to a considerable portion of that property in the event of his death. This would defeat that clause of the contract by which he reserved the right to dispose of the same by will. To whom the property should be bequeathed was a matter wholly within the control of deceased, if our construction of the contract in reference to his intention is correct, and if the same has been so prepared as to give effect to that intention. He might have willed the property to the plaintiff, as well as to another; whether she had in view such a result, in addition to the terms and provisions of said contract as to her interests, we can not say. We are not disposed to regard the provisions of the contract for the plaintiff's benefit, as being in compensation for any outlays she might be at for the maintenance, clothing, or education of the defendants, if such should be necessarily incurred by her in discharge of the maternal relations she was about to assume toward them. Nor is it necessary for us to decide whether or not, any physical labor was contemplated as due from her in "caring" for said defendants, after the death of their father. This question can not arise, because the demurrer admits the averments of the answer that she has failed to perform, &c. But still we might say, incidentally, in construing the contract, that the ages of the children are not given, nor that of the plaintiff; nor is any time fixed during which she was to take care of defendants; only while they were "willing to stay with her," or until they were "able to take care of themselves." How

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long this might be, and how much, if any, longer it might be presumed, in the usual course of nature, the plaintiff would live to enjoy the provision made for her, we are not informed; indeed, the same is left entirely indefinite, as if it was to depend much upon the affection or aversion that might spring up between those interested in its ultimate performance. The total abandonment, without cause, of marital duties, about to be assumed, does not appear to have been foreseen, nor provided for. Nor need we stop to consider what effect such a state of facts, if clearly shown, would have upon the provisions of said contract. All we need decide now, and all we do decide, is that, in our opinion, the provisions of the contract, so far as the plaintiff's interests were included, was intended to, and do, exclude her from claiming that portion of, and interest in, the realty which, otherwise, under the law, she could have claimed. *Houghton v. Houghton*, 14 Ind. 506. As to whether a service upon the testamentary guardian was sufficient, or not, to bring into Court his ward, we are of opinion that in applications for partition, service upon such guardian is sufficient, because of the statute, 2 R. S., § 24, p. 328, authorizing him to agree to a partition under the direction of the Court.

Per Curiam.—The judgment is reversed, with costs. Cause remanded, &c.

Isaac Van Devanter and *J. F. McDowell*, for the appellants.

J. Brownlee, for the appellee.

AN INDEX

TO THE PRINCIPAL MATTERS

CONTAINED IN THIS VOLUME.

A.

ABATEMENT.

Pleas in. See PLEADING, 18.

Order of Pleading. See PRACTICE, 23.

1. After pleading the general denial, the defendant can not plead in abatement; and when a cause is on trial on the merits, matter in abatement is inadmissible in evidence.—*Sowle v. Holdridge*, 236
2. Where, to an action by a corporation, the defendant pleads the general issue, he admits the capacity of the plaintiff to sue, and can not, at the same time, plead *nul tiel corporation*, because a plea in abatement can not be pleaded in connection with a plea in bar.—*Carpenter et al. v. The Mercantile Bank*, 253

ACCOUNT.

1. One partner may assign his interest in an open account due the firm, to his co-partner, so as to enable the latter to maintain an action thereon in his own name.—*Swails v. Coverdill*, 337
2. The assignor of an account must, in an action thereon by his assignee, be made a defendant to answer as to his interest; but the mere fact of naming him as a defendant, does not make him "an adverse party," nor is he a competent witness for the plaintiff to prove the account. *Ibid.*

ACTION.

1. An action will lie by a mere rightful possessor, against a wrong doer, for any injury to the possessor's rights.—*Catterlin v. Douglass*, 213

2. *Quære*: Whether, under our code, an action in the nature of an action on the case at law, can not be maintained against a trustee for negligence.—*Bennett v. Preston et al.*, 291
3. For a tort committed upon a wife, two actions will lie, as a general rule; one by the husband alone, for loss of service, expenses, &c., and the other by the husband and wife for the injury to the person.—*Rogers v. Smith*, 323
4. So also for an injury to a child; the father may maintain an action for loss of service, expenses, &c., while the right of action for the personal injury is in the child. *Ibid.*

ADEMPTION.

Of Legacy. See WILL, 9, 10, 11.

ADJOURNED TERM.

1. Trial and judgment at a regular term of the Circuit Court, in *October, 1860*. By adjournment, that term of the Court was continued until *November*, in the same year. At the adjourned term, an appeal was prayed, granted and perfected, by giving bond, &c. Motion by the appellee, in the Supreme Court, to dismiss the appeal, or for an order that the appeal should not operate to stay proceedings upon execution. *Held*, that under the statute providing for adjourned terms, (Acts 1858, p. 37,) the adjourned term must be deemed a part of the regular term, and every step may be taken at such adjourned term, that might have been taken at the regular term.—*Smith et al. v. Smith, Adm'r of Ellsworth*, 75
2. That where the Court is continued from the regular term to an adjourned term,

the proceedings may be said to be *in fieri*, until the close of the adjourned term, and the records are, consequently, completely under the control of the Court. *Ibid.*

3. The *Morgan* Circuit Court having, at its regular term, entered upon the trial of a contested election case, which it was expected would consume the residue of the term, made an order discharging the parties and witnesses in all other cases. The election case was unexpectedly disposed of long before the close of the term, and the Court having entered of record the foregoing facts as a reason for the adjournment, directed the clerk to give notice of an adjourned term of Court, to be held on a day fixed by the order. *Held*, that the record sufficiently set forth the ground upon which the adjournment was ordered, and that the adjourned term was legally held.—*Shiel v. Maffett*, 316

4. A Circuit judge having been of counsel in a cause pending in his court, set the same for trial before a judge of the Supreme Court, who appeared at the time designated, being in regular term time, heard some arguments and made some orders therein as to making new parties, &c. The Supreme judge not having appeared further in said cause, the same was again set for trial by the judge of the Circuit Court, before a judge of another circuit. This was done by agreement of the parties, entered of record. The cause was accordingly heard before the judge last designated, who, after repeated adjournments, from time to time, and not within any regular term of said Court, decided the same, and rendered judgment for plaintiff, over a motion for a new trial by defendants. *Held*, that the judgment thus rendered was valid and binding; that said judge last designated had full power under the act of March 1, 1855, (Acts 1855, p. 61,) to adjourn the hearing of said cause from time to time, although some of said adjournments might have been to a day beyond a regular term of said Court.—*The Cincinnati, &c. Railroad Co. et al v. Rowe et al.*, 568

5. An order of the Circuit Court continuing said cause to another term, while the same was pending before the judge designated to try the same, was without authority. *Ibid.*

AD QUOD DAMNUM.

1. Suit by *A.* against *B.*, *C.*, and *D.*, to recover damages for backing water upon the lands of the plaintiff. On the trial, the defendants offered and gave in evidence, over the plaintiff's objection, the record of a proceeding upon a writ of *ad quod damnum*, in the same Court, upon the petition of the grantors of the defendants. The petition for the writ did not name any of the proprietors whose lands it was supposed would be affected by the dam. The inquest of the jury set out that they had examined the land about the site of the proposed dam, and named several persons whose lands might be affected, but did not name the grantors of the plaintiff, nor did it describe any land which would probably be affected. Notice was given only to the persons named in the inquest, and they not appearing, the inquest was confirmed, and leave given to erect the dam. The Court instructed the jury, that only the owners who would probably be injured need be named in the inquest, and the plaintiff's grantors not being named, the inference was that, in the estimation of the jury, they would not be injured by the erection of the dam, and that the record of the *ad quod damnum* was properly in evidence to show that the defendants had a right to build such a dam; but that if *A.*, or his grantors, had no notice of the proceedings, then the plaintiff's claim would not be barred; but persons not named are barred, if they in any manner had sufficient notice of the proceedings to know what was going on; and whether the notice be written or verbal makes no difference. *Held*, that the record was improperly admitted in evidence, and that the instruction of the Court was erroneous; that the person applying for leave to build a dam, acquires the right to do so, only as against those whose lands the jury find will probably be affected, and who are notified, as provided by the statute.—*Lane v. Miller et al.*, 58
2. The doctrine of *lis pendens* had no application to the case; as, though the parties who then owned the land might actually have known of the pendency of the proceeding, yet they had a right to presume that, if the jury supposed their lands would be injuriously affected, they would be notified and made parties. *Ibid.*

3. That where an error is committed, in the admission of incompetent testimony, and the giving of an erroneous charge based upon it, there is no necessity that the record should contain all the evidence given in the cause, or that the case should be specially stated in accordance with § 347 of the code, in order to have the error reviewed in the Supreme Court.
Ibid.

AMENDMENT.

After Evidence closed. See PRACTICE, 15.

Of Law or Charter. See PRACTICE, 17.

Of defective Award. See PRACTICE, 38.

May amend Summons by Complaint. See SUMMONS, 1.

1. The granting of leave to amend the pleadings, while a cause is on trial, is a matter within the sound discretion of the Court, and unless it appears that the discretion has been improperly exercised, the Supreme Court will not notice the ruling.—*Volts v. Neubert et al.*, 187
2. After the jury has been sworn, and a portion of the evidence heard, in an action for slander, it is too late for the plaintiff to amend by inserting an entire new set of words, essentially different from those previously alleged, and of themselves constituting a new cause of action.—*Miles v. Vanhorn*, 245
3. A party by amending his plea, after a demurrer has been sustained to it, waives his right to complain of the sustaining of the demurrer.—*Jay et al. v. The Indianapolis, &c. Railroad Co.*, 262
4. Where the defendant amends his answer, after a demurrer has been sustained to it, he waives all right to complain of the ruling on the demurrer.—*Ham et al. v. Carroll*, 442

ANTE-NUPTIAL CONTRACT.

See PRACTICE, 55, 56.

APPEAL.

From Street Precepts. See STREETS, 11.

Record in Criminal Case. See RECORD, 6.

1. An appeal will lie to the Supreme Court from an order of sale, in a proceeding for the partition of lands, made on report of

the commissioners that the land is not susceptible of division.—*Hunter et al. v. Miller et al.*, 88

2. The liquor law of 1859 does not give an appeal from the judgment of a justice in a prosecution for a violation of that law, and as the general statute on the subject of appeals from justices in criminal cases only gives an appeal to the Common Pleas, no appeal will lie to the Circuit Court from the judgment of a justice for a violation of the liquor law.—*Dearth v. The State*, 523

APPLICATION OF PAYMENTS.

Where there is a special agreement, or direction, as to the application of payments made by a debtor to his creditor, they must be so applied, unless a different appropriation is made by consent of the parties.—*Hughes et al. v. McDougle et al.*, 399

ARBITRATION.

Of Slander. See PRACTICE, 39.

1. Suit for an accounting, and the settlement of a co-partnership. The cause being at issue, was, upon the written consent of the parties, and by order of the Court, referred to two persons. The agreement of reference, and the order of the Court, provided that if the arbitrators differed in opinion upon any question of fact or law, they should make a minute in writing of the point, for the decision of the Court. An award was made, and two points upon which the arbitrators differed were referred to the Court for determination. On the return of the award, the plaintiff moved to set it aside: 1. Because the arbitrators failed to report the facts of the case. 2. Because they disregarded pertinent evidence. 3. Because they did not pass upon the individual accounts of the parties. 4. Because they did not make a division of the notes and accounts of the firm. 5. Because they appointed other persons to examine the books of the firm. 6. Because they acted upon statements of the defendant, which plaintiff has since discovered to be false, though he could not by diligence have proved them false at the hearing. *Held*, that if the reference of the cause was made under §§ 349, 350, 351 of the code, then the report of the referees could only be reviewed by the Court for matters appearing upon the face

- of the report, including all bills of exceptions taken before the referee; but if the reference was to arbitrators, as at common law, then the objections to the award might be shown by extrinsic evidence.—*Moore v. Barnett*, 349
2. The intention seems to have been to make a common law reference to arbitrators, rather than a trial by referees under the code. *Ibid.*
 3. None of the objections to the award were well assigned; no fraud or corruption was charged, and a mistake of judgment is not sufficient to vacate an award at common law. *Ibid.*
 4. The arbitrators had power to appoint other persons to examine the books. *Ibid.*
 5. A request of the Court to state a special finding, made after the Court has commenced to render its judgment, comes too late. Perhaps, also, the request should be accompanied with notice to the Court that the party intends to take the cause to the Supreme Court, upon the finding. *Ibid.*
 6. Perhaps, where a suit pending and at issue is referred by a rule of the Court to arbitrators, the award, if defective, should, like a verdict in such cases, be sent back to the arbitrators, on motion of the dissatisfied party, for correction. *Ibid.*

ARREST OF JUDGMENT.

Motion in. See PLEADING, 12.

ASSAULT AND BATTERY.

With Intent to Murder. See INDICTMENT, 1.

ASSIGNMENT.

Of Errors. See ERROR, 1, 2, 3, 4, 5, 6.

1. One partner may assign his interest in an open account due the firm, to his co-partner, so as to enable the latter to maintain an action thereon in his own name.—*Swails v. Coverdill*, 337
2. A debtor in failing circumstances may prefer his creditors, and may assign the whole of his property for the benefit of a single creditor, in exclusion of all others, or he may distribute it in unequal proportions among a part, or the whole, of his creditors; but in doing so he must act

in good faith, without any purpose of defrauding such of them as are not preferred.—*Wynne et al. v. Glidewell et al.*, 448

3. The declarations of the debtor, made after the execution of the assignment for the benefit of his creditors, can not be given in evidence against the assignee, to defeat his right to the property. *Ibid.*
4. In suits to set aside the transfer or assignment of property, on the ground of fraud, the question of fraudulent intent is one of fact, and not of law, and the jury are the exclusive judges of the entire question; not only of the effect and weight of the circumstances adduced to prove such intent, but also whether the facts proved really amount to circumstances conducing to show it; and hence an instruction from the Court that certain circumstances tend to prove a fraudulent intent, is erroneous. *Ibid.*
5. Suit upon a promissory note. Answer: that after the making of the note sued on, the defendant, being in failing circumstances, made an assignment for the benefit of his creditors; that afterward a majority of his creditors, the plaintiff among the rest, agreed with the defendant in writing, that if he would execute to them his notes, with approved security, for one half of his several debts to them, they would discharge him from the whole amount of the original debts; that pursuant to said agreement he did execute said new notes, and that the same were accepted by all the creditors who executed such agreement, except the plaintiffs, and defendant brings said notes into Court, &c. *Held*, that the answer was good; as a single creditor, or any number of creditors, may compound with their debtor, so it is not made a condition in the agreement that all the creditors shall come into the same agreement.—*Devon et al. v. Ham*, 473

ASSIGNOR AND ASSIGNEE.

The assignor of an account must, in an action thereon by his assignee, be made a defendant to answer as to his interest; but the mere fact of naming him as a defendant does not make him "an adverse party," nor is he a competent witness for the plaintiff to prove the account.—*Swails v. Coverdill*, 337

ATTACHMENT.

Where a person summoned as a garnishee answers that he was indebted to the attachment defendant, but that before the service of the writ of garnishment, he was notified of the assignment of the note constituting such indebtedness, if the plaintiff desires to dispute such assignment for want of consideration or for fraud, it is proper, if not necessary, to bring the person claiming to hold as assignee, before the Court, so that he may be bound by the judgment; and on the trial of an issue thus formed, the attachment defendant would be a competent witness. *Quære*: Whether the question of a fraudulent transfer can, if objected to, be tried in the garnishment proceeding.—*Cadwalader et al. v. Hartley et al.*, 520

ATTORNEY.

District, Fees of. See FEES, 1.

1. A creditor may make a condition in his contract, that if the debtor suffers himself to be sued for the debt, he shall pay the attorney's fee of the creditor, as well as the taxable costs of the case.—*Brown v. Maulsby et al.*, 10
2. *A.* being the owner of certain lands, gave a written power of attorney to *B.*, authorizing him to sell, assign, transfer, trade and dispose of said lands, either for cash or in exchange for other property. He was to continue to act as such attorney for eighteen months, and to receive for his services one half of all he might make out of said property over a certain price, and where other property was taken in exchange, the compensation was to be determined by getting other persons to estimate the value of the property so taken. *B.* having, by exchange, procured a certain mill property, rented the same to *C.*, who was dispossessed by a lessee of *A.*, on the ground that *B.* had no authority to rent said lands. Suit by *C.* to recover possession. *Held*, that as the evidence as to the authority of *B.* to rent the premises was conflicting, it was competent for *C.* to prove that *B.* had acted as the agent of *A.* in renting other lands taken by him in exchange under his power of attorney.—*Hitchens v. Ricketts et al.*, 625

3. Under the offer of attorney, *B.* had such a power, coupled with an interest, as gave him authority to rent, at least until such time as he and his principal should close their accounts. *Ibid.*

AWARD.

Defective, how Amended. See PRACTICE, 38.

In pending suit, filed and proved, and not pleaded. See PRACTICE, 39.

B.

BANKS.

"Contract" with, Construed. See STATUTES CONSTRUED, 35.

1. Suit against the *Bank of Gosport*, a free bank organized under the law of 1855, upon a bill of exchange drawn by "*A. B.*, Pres.," and alleged to be the bill of said bank, of which the said *A. B.* was then and there president. The bill was indorsed by the drawee in blank, and also contained a subsequent special indorsement, which had been erased. Answer, in denial, with an agreement that all matters of defense might be given in evidence under it. *Held*, that § 18 of the free bank law of 1855, (Acts 1855, p. 23,) which requires that the place where a bank is located, if not a county seat, shall contain not less than one thousand inhabitants, is probably merely directory, but if not, the defendant was not, in this case, in a position to make such a defense.—*Allison, President of the Bank of Gosport v. Hubbell*, 559
2. While it is the province and duty of the Court to construe statutes and interpret the language employed by the law makers, yet the object to be arrived at is the intention of such law makers; which must be derived, if possible, from the act itself, or, from that when considered in connection with other statutes upon the same subject; or, from those things together with contemporaneous construction of, or usage under, said statute. *Ibid.*
3. In carrying on the ordinary, or daily, business of banking, under said free banking law, such as drawing, indorsing, and accepting bills of exchange, giving certificates of deposit, &c., either the president or cashier is authorized to bind the institution, in the absence of any specified

manner of transacting said business in the articles of association. *Ibid.*

4. The evidence of the cashier that the drawing of the bill was a transaction not known to the books of the bank, was not sufficient to relieve the bank from the presumption arising from the face of the bill that it was the bill of the bank, as the president might have received the proceeds for the use of the bank and failed to pay them over. *Ibid.*
5. All corporations organized under the provisions of the act of June 15, 1852, establishing general provisions respecting corporations, (1 R. S. 1852, p. 239,) are considered as in being for three years after they shall have ceased, legally, to exist, for the purpose of their organization, in order that the affairs of such corporation may be properly closed up, if necessary, by suits to be conducted in the name of the defunct body.—*Herron, Receiver of the Savings Bank of Indiana v. Vance et al.*, 595
6. As corporations might be organized under the act of June 15, 1852, *supra*, of such a character as to fall within the class of "moneyed corporations," as intended by § 28 of the act to regulate the business of general banking, (1 R. S. 1852, p. 159,) it appears to follow that so far as proceedings to dissolve corporations for banking purposes, and the appointment and duties of a receiver are governed at all by special statute, the act establishing general provisions respecting corporations, (1 R. S. 1852, p. 239,) should maintain. *Quære*: Whether, in view of these statutes, any averments could be made in a complaint showing authority to prosecute or defend suits within three years, in the name of a receiver, or in any name other than that of the corporation. *Ibid.*
7. The liability of each stockholder for the shares of stock subscribed by him, is several, and not joint with the other subscribers; and hence, a joint suit for the collection of the amounts due upon subscription will not lie; but where there is an averment of the insolvency of the corporation, and a prayer for a settlement of its affairs, all the stockholders may be joined in one suit, under an order of the proper court to that effect, so as to adjust the whole affairs of the corporation, and determine their respective rights and liabilities, and cross equities. *Ibid.*
8. The complaint should, in such case, be accompanied by a copy of the articles of association of the bank, and should contain proper averments of the liability of each person whose signature appears thereto. *Ibid.*

BASTARDY.

1. On the trial of a prosecution for bastardy, it appeared that the child was born on September 18, 1858. The defendant offered to prove that in the first week in November, 1857, the relator had had sexual intercourse with another man. *Held*, that the testimony was rightly rejected.—*Duck v. The State, ex rel. Dill*, 210
2. Where, in a prosecution for bastardy, the defendant is discharged, &c., on account of the failure of the relator to appear, the judgment, not being upon the merits, is not a bar to a further prosecution.—*The State, ex rel. Sumpter v. Barbour*, 526
3. The failure of the justice to enter of record a finding that the defendant was the father of the child, is of no consequence where the defendant is recognized. *Ibid.*
4. Suit upon a promissory note. Answer:
 1. That said note was given in compromise of a pending prosecution for bastardy, fraudulently instituted by the plaintiff against the defendant, in which she falsely represented that defendant was the father of her child; and that the consideration of said note had failed, in this, that subsequently to the giving of said note, it was agreed between plaintiff and defendant that if said child was not born before a given time, that said note should be delivered up and canceled, and that said child was not born before the said time limited.
 2. That said note was obtained by fraud and false representation, in this, that the same was given in compromise of a prosecution for bastardy, in which plaintiff fraudulently and falsely charged the defendant to be the father of her child, she well knowing that one A. B. was the father of said child. *Held*, that so far as the first paragraph of the answer averred a want of consideration, it was bad.—*Niceoanger v. Bevard*, 621
5. *Quære*: Whether the consideration shown in the first paragraph of the answer for the alleged agreement to surrender the note was sufficient, and if so, could such

agreement be set up as a defense to the action on the note. *Ibid.*

6. *Held*, also, that the second paragraph of the answer was good. *Ibid.*

BILL OF EXCEPTIONS.

To Instructions, must be signed by the Judge.
See INSTRUCTIONS, 14.

1. A bill of exceptions purporting to set out the evidence, must contain the words, "this was all the evidence given in the cause." The words, "this was all the evidence given on said trial" are not sufficient.—*Branham et al. v. Bradford*, 47
2. A recital, in a bill of exceptions, that "this was all the testimony given in the cause," is not within rule 30 of this Court; the word "testimony," not being synonymous with "evidence."—*Downs et al. v. Downs*, 95
3. No other judge than the one who tried the cause can correct a bill of exceptions.—*Halstead v. Brown*, 202
4. A motion to tax costs can not be noticed in the Supreme Court, unless there be a bill of exceptions showing the ruling of the Court below.—*Urton v. Luckey*, 213
5. Suit upon a promissory note. Answer: want of consideration, specially setting out the facts. The plaintiff moved to strike out the answer, as a false and sham pleading; and in support of his motion filed affidavits which tended to show the several matters alleged in the answer to be untrue; and the defendant having declined to affirm his belief as to the truth of his answer, or to give any evidence that the same was true, or that it was filed in good faith, the Court sustained the motion. *Held*, that neither the motion nor the affidavits made any part of the record, on appeal, there being no order of the Court or bill of exceptions making them such.—*Merrill v. Cobb*, 814

BILLS OF EXCHANGE.

Suit by an assignee, upon the following instrument, viz., "*Lafayette, Ind., December 4, 1856. Ten months after date, value received, pay to the order of A. B., assignee, five hundred dollars, and charge the same to account of yours.*" &c. [Signed] "*W. C.*" "To *E. W., Esq., Treasurer, N. Y.*" Across the face of the

instrument was written, "Accepted for, and on behalf of, *The Toledo, Wabash and Western Railroad Company*, payable at," &c. [Signed] "*E. W., Treasurer.*" The instrument was indorsed, "Pay the within to the order of *K. & B.*" [Signed] "*A. B., assignee of J. M. F.*" By an indorsement of *K. & B.* the instrument was transferred to the plaintiff, who caused it to be presented and duly protested, and notices to be given, &c. It was averred in the complaint that *W. C.* was, at the time, &c., a chief engineer of said railroad, and that said bill was drawn on account of labor done in the construction of said railroad, &c. *Held*, that if the doctrine is correct that there are instruments that may be treated by the holder as either a bill of exchange or a promissory note, this was clearly a case in which the holder was entitled to treat the paper as a bill of exchange, and subject to the laws governing such paper, and this right was not waived by the averment that it was drawn by an officer of the company for work done in the construction of the road.—*Burnheisel v. Field et al.*, 609

BOND.

See PROMISSORY NOTE, 5.

Of Cities. See PRINCIPAL AND AGENT, 2, 3, 4, 5, 6, 7.

1. Suit against a recorder and the sureties, on his official bond. The breaches alleged were, *first*, that he failed to index twenty thousand deeds, that were in his office at the time he assumed the duties thereof; and, *second*, that he failed to keep up and continue the index to ten thousand deeds, that were recorded by him during his continuance in office. *Held*, that as to the first breach alleged, only nominal damages, if any, could be recovered, as the recorder would have been entitled to extra compensation for indexing deeds recorded before his time.—*The State, ex rel., &c. v. Atkinson et al.*, 26
2. As to the second breach, the county board was authorized to employ his successor to index the deeds recorded during the defendant's term; and as he would not have been entitled to any extra allowance for keeping up such index, the board can recover, in an action on his bond, such reasonable sum as they may have paid to index the deeds recorded during his term. *Ibid.*

C.

CIRCUIT COURT.

See LIQUOR, 1.

As the Circuit Court is a court of general and unlimited jurisdiction, its authority to proceed in the trial of a cause need not affirmatively appear in the complaint; and hence in a petition for partition of lands, it need not be averred that the land lies in the county where the suit is brought.—*Godfrey v. Godfrey et al.*, 6

CITIES.

See STREETS, 1, 2, 3, 4, 5, 12, 13, 14, 15.
MUNICIPAL LAW, 1, 2.

Set-off against. *See* STREETS, 1.

Against Agents wrongfully pledging bonds of.
See PRINCIPAL AND AGENT, 2, 3, 4, 5, 6, 7.

Records of City Council. *See* PRINCIPAL AND AGENT, 2, 4.

COLLATERAL SECURITY.

1. The holder of a claim as collateral security may sue on it, and hold the money when collected in place of the note or evidence of debt, even though the debt on which the collateral security was given is not yet due.—*Jones v. Hawkins*, 550
2. An answer to a suit upon a note held as collateral security, alleging that the note was assigned for the security of the plaintiff and one A., who is not joined as plaintiff, is bad, unless it be averred that the interest of A. in the note still existed at the time of the suit. *Ibid.*
3. Where a promissory note is assigned as collateral security for a debt less than the amount of said note, the maker of the note may obtain and have a set-off against the payee to the amount of the excess of the note above the debt on which it was assigned as collateral. *Ibid.*

CONSIDERATION.

See HUSBAND AND WIFE, 1, 2.

Plea of Partial Failure. *See* PLEADING, 29.
Went of, must be Specially Pleaded. *See* PLEADING, 33.

1. A's wife died testate, and by her will bequeathed to B., C., and D., each, the

sum of \$200, but left no property out of which the legacies, or any part of them, could be satisfied. After her decease, A. entered into an agreement, in writing, with the legatees, by which he agreed to pay to them the several sums bequeathed to them by his wife, in consideration, 1. of one cent; 2. of the love and affection he bore his deceased wife, and the fact that she had done her part in the acquisition of his property; and 3. that she had expressed her desire by her will, that they should have said sums of money. Suit upon the agreement. Answer: want of consideration. *Held*, that the doctrine that inadequacy of consideration will not vitiate an agreement, does not apply to a mere exchange of sums of money, the values of which are exactly fixed; but to the exchange of something of indefinite value, for money, or for some other thing of indefinite value.—*Schnell v. Nell*, 29

2. A consideration of one cent will not support a promise to pay six hundred dollars; but such a contract is so unconscionable as to be void, on its face. *Ibid.*
3. The wife's will imposed no obligation on A. to pay the legacies out of the property; and as his wife had none of her own, out of which they might be paid, his promise to pay them was not legally binding upon him. *Ibid.*
4. Where a claim is legally groundless, a promise made upon a compromise of it, or of a suit upon it, is not binding. *Ibid.*
5. The love A. bore his wife, and her services in the acquisition of his property, were not good considerations to support his promise to pay the legacies, *first*, because they were past considerations; and, *second*, because they constituted no consideration for a promise to pay money to a third person. *Ibid.*
6. If a conveyance be made to a third person, in satisfaction of illegal claims taken up by such third person, at the request of the grantor, such conveyance is upon a valid consideration; and, in this case, there was such a consideration, even if the bonds were void for usury.—*Buller et al. v. Myer*, 77
7. There is no reason why corporations should not be bound by the same moral considerations that bind individuals. *Ibid.*

8. There is no valid reason why the engagement of a surety may not be founded upon a consideration variant from that which induced his principal to execute the agreement; and if such consideration be a condition subsequent, to be performed by the creditor, his failure to perform it would operate as a fraud upon the surety, and release him from all liability upon his engagement.—*Campbell v. Gates*, 126

9. It is plainly competent for the surety to set up and prove such failure of consideration, because such defense is not in conflict with the legal effect of the contract.

Ibid.

10. Suit against A. upon a promissory note, as follows, "Due on demand to B. & Co., eleven hundred and four dollars and sixty cents, balance on lumber furnished the State Fair Grounds." (Signed,) "A., Superintendent." Answer: that the note was given for the price of certain lumber, which the payees had before that time sold and delivered to the *State Board of Agriculture*, and was signed by the defendant as superintendent of said board, for the purpose of liquidating the debt, and as the note and obligation of said board, not for the purpose of binding defendant, and for no other consideration, &c. *Held*, that the note having been given for a claim which the payees already had against the *State Board of Agriculture*, and without any new consideration, was *nudum pactum*; the previous indebtedness of the board to the payees not being, of itself, a sufficient consideration to support the promise of A. to pay the debt.—*Bingham v. Kimball*, 396

11. A want of consideration can not, under the code, be given in evidence under the general denial, as it formerly could under the general issue. *Ibid.*

12. Suit upon a promissory note. Answer: 1. That said note was given in compromise of a pending prosecution for bastardy, fraudulently instituted by the plaintiff against the defendant, in which she falsely represented that defendant was the father of her child; and that the consideration of said note had failed, in this, that subsequently to the giving of said note, it was agreed between plaintiff and defendant that if said child was not born before a

given time, that said note should be delivered up and canceled, and that said child was not born before the said time limited. 2. That said note was obtained by fraud and false representation, in this, that the same was given in compromise of a prosecution for bastardy, in which plaintiff fraudulently and falsely charged the defendant to be the father of her child, she well knowing that one A. B. was the father of said child. *Held*, that so far as the first paragraph of the answer averred a want of consideration, it was bad.—*Nicewanger v. Bevard*, 621

13. *Quære*: Whether the consideration shown in the first paragraph of the answer for the alleged agreement to surrender the note was sufficient, and if so, could such agreement be set up as a defense to the action on the note. *Ibid.*

14. The second paragraph of the answer was good. *Ibid.*

CONSTITUTIONAL LAW.

1. The remedy now given for the collection of assessments for the grading and graveling of streets, viz., by precept issued by the mayor and clerk, under the direction of the council, is constitutional.—*Flournoy et al. v. The City of Jeffersonville*, 169

2. The issuing of the precept is a ministerial act, and may be performed by any person upon whom the law may cast the duty; the judicial determination of the case is had upon appeal. *Ibid.*

3. Judicial acts, within the meaning of the Constitution, are such as are performed in the exercise of judicial power, and must, hence, be performed by a court, touching the rights of parties, or property, brought before it by voluntary appearance, or, by the prior action of ministerial officers. *Ibid.*

4. A ministerial act is one which a person performs in a given state of facts, in a prescribed manner, in obedience to the mandate of legal authority, without regard to, or the exercise of, his own judgment upon the propriety of the act being done. *Ibid.*

5. The act of *March*, 1859, fixing the time and mode of electing a State printer, &c., (Acts 1859, p. 143,) was intended to fix the prices to be paid for the public printing thereafter to be done, whether by the State printer then in office, or by those to be elected under the provisions of that act; and the title of the act was sufficient to authorize such legislation under it.—*Walker v. Dunham, Secretary of State*, 483
6. The act is not obnoxious to the objection that it contains more than one subject, and matters properly connected therewith, as the Legislature may well, in one act, define the duties and fix the compensation of an officer, and provide for the future filling of the office. *Ibid.*
7. The State printer is an officer, and the compensation and duties of an officer may be increased or diminished, in the absence of constitutional restrictions, at the pleasure of the Legislature. *Ibid.*
8. Suit to restrain the collection of a judgment rendered upon certain bonds filed with the county auditor, under the provisions of the act of *March* 4, 1853, to regulate the sale of spirituous liquors, &c., (Acts 1853, p. 87.) The complaint alleged that the act under which the bonds were filed was unconstitutional and void, and that the judgment, for that reason, was a nullity. *Held*, that the act being unconstitutional and void, the bonds were not supported by a legal consideration; but the judgment rendered thereon, though erroneous, was not void, but must be regarded as operative until reversed by a court of error.—*Cassel v. Scott et al.*, 514
9. The act of *June* 4, 1861, (Acts Spec. Sess. 1861, p. 79.) providing for the redemption of real property sold upon execution, &c., so far as the same was intended to apply to sales on judgments rendered upon contracts existing at and before its passage, is in conflict with Art. 1, § 10 of the Constitution of the *United States*, which prohibits the passage of any law impairing the obligation of contracts.—*Scholey v. Gibbon*, 572

CONSTITUTION OF THE UNITED STATES, Section cited.

- Art. 1, § 10.—Laws Impairing Obligation of Contracts, 573

CONSTITUTION OF INDIANA, Sections cited.

- Art. 1, § 22.—Exemption, 134
 Art. 6, § 6.—Duties of Clerk of Court, 172
 Art. 11, § 13.—Corporations, 244
 Art. 2, § 14.—Elections, 556
 Art. 1, § 24.—Laws Impairing Obligations of Contracts, 576

CONSTRUCTION OF WRITTEN INSTRUMENTS.

Where a question of construction of a writing arises from the obscurity of the writing itself, it must be determined by the Court alone; but questions of usage, custom, and actual intention and meaning derived therefrom, are for the jury.—*Prather et al. v. Ross*, 495

CONTINUANCE.

See ADJOURNED TERM, 5.

In an affidavit for the continuance of a cause, on account of the absence of a witness, the defendant attempted to excuse his want of diligence, by showing that the note sued on was given for a balance found by the witness, as an accountant, to be due the plaintiff on the dissolution of a co-partnership, and that a mistake occurred in such accounting, which the witness could not ascertain without an examination of the books, and that he had not time to do so, &c. *Held*, that the affidavit did not show a valid excuse for the failure to procure the attendance of the witness.—*Brown v. Shearon*, 239

CONTRACT.

See STREETS, 8, 9. DEED, 6.

Rescission of. See DAMAGES, 8.

Imbecility and Ignorance. See FRAUD, 1.

Of Forbearance. See STOCK, SUBSCRIPTION OF, 1, 2. MORTGAGE, 7, 8.

Ante Nuptial. See PRACTICE, 55, 56.

1. A condition in a note, or other contract for the payment of money, that if not paid at maturity, interest will be charged from the date of the contract, is valid.—*Brown v. Maulsby et al.*, 10

2. So a condition, that if a given installment of a debt shall not be paid at a given time, the whole debt shall become due, is valid. *Ibid.*
3. A creditor may make a condition in his contract, that if the debtor suffers himself to be sued for the debt, he shall pay the attorney's fee of the creditor, as well as the taxable costs of the case. *Ibid.*
4. On *January 22, 1856*, *A.*, by his agreement in writing, sold, and agreed to convey to *B.*, lot No. 70, in *Woods'* addition to the city of *Indianapolis*, for the sum of \$800; \$400 of the purchase money to be paid *March 1, 1856*, and the residue *March 1, 1857*; a deed to be made on the payment of the first installment of the purchase money, and the residue to be secured by a mortgage on the premises. The first payment was not made on *March 1, 1856*, nor was a deed then tendered. On *May 2*, however, *B.* paid \$400, and the agreement was so far modified, as to extend the time of making the deed until *May 2, 1857*. *A.* and wife, at the time, executed to *B.* a mortgage upon lot No. 71, in said addition, the separate property of the wife, to secure the payment of said sum of \$400, so paid by *B.* on the purchase of lot 70. Contemporaneously with the execution of said mortgage, *B.* executed a written agreement, reciting the making of the mortgage, and conditioned that the same should be void, on the conveyance of lot No. 70 to him, on or before *May 2, 1857*. Before the time last named, *A.* died intestate, without having conveyed said lot, leaving his widow and one child his heirs surviving. *B.* continued in the occupation of said lot No. 70, without having paid or tendered the balance due on the lot. Suit by an assignee of *B.* upon the mortgage, to recover the \$400. *Held*, that the mortgage and written instrument, being contemporaneous, and having reference to the same subject matter, must be held to be one contract; and that the original agreement was not annulled by the new, but merely modified as to time of payment, and by securing the making of a conveyance by a mortgage on another lot.—*Cressey et al. v. Webb*, 14
5. The suit, though based upon a mortgage, was in fact a suit to recover purchase money, advanced upon a contract for the sale of real estate, and the plaintiff could not recover, unless *B.* had placed himself in a position to rescind the contract; and this he had not done, as he still held possession of the premises, under the contract of sale. *Ibid.*
6. *A.*'s wife died testate, and by her will bequeathed to *B.*, *C.*, and *D.*, each, the sum of \$200, but left no property out of which the legacies, or any part of them, could be satisfied. After her decease, *A.* entered into an agreement, in writing, with the legatees, by which he agreed to pay to them the several sums bequeathed to them by his wife, in consideration: 1. of one cent; 2. of the love and affection he bore his deceased wife, and the fact that she had done her part in the acquisition of his property; and 3. that she had expressed her desire by her will, that they should have said sums of money. Suit upon the agreement. Answer: want of consideration. *Held*, that the doctrine that inadequacy of consideration will not vitiate an agreement, does not apply to a mere exchange of sums of money, the values of which are exactly fixed; but to the exchange of something of indefinite value, for money, or for some other thing of indefinite value.—*Schnell v. Nell*, 29
7. Consideration of one cent will not support a promise to pay six hundred dollars; but such a contract is so unconscionable as to be void, on its face. *Ibid.*
8. The wife's will imposed no obligation on *A.* to pay the legacies out of his property; and as his wife had none of her own, out of which they might be paid, his promise to pay them was not legally binding upon him. *Ibid.*
9. Where a claim is legally groundless, a promise made upon a compromise of it, or of a suit upon it, is not binding. *Ibid.*
10. The love *A.* bore his wife, and her services in the acquisition of his property, were not good considerations to support his promise to pay the legacies, *first*, because they were past considerations; and, *second*, because they constituted no consideration for the promise to pay money to a third person. *Ibid.*
11. On *December 22, 1857*, *A.* recovered a judgment against the *Cincinnati and Chicago Railroad Company*, upon which he

caused an execution to be issued, and levied upon certain real estate. *B.*, who was in possession of the land, filed his bill to enjoin the sale on the execution, alleging that on *October 1, 1853*, the railroad company, being then the owner of said land, conveyed the same, with other property, to trustees, in trust to convey the same in satisfaction of bonds of the company, as the company should direct; that on *January 13, 1857*, said trustees, by the direction of the company, conveyed the land to plaintiff's grantors, they having taken up, and surrendered to the company, her said bonds, to the amount of the appraised value of the lands. Answer: that the bonds of the company, mentioned in the complaint, were executed, by a corporation, under the authority of the State of *Indiana*, and were made payable in the State of *New York*, bearing interest at ten per cent.; that instruments bearing a higher rate than seven per cent. were void by the law of the State of *New York*, which was set out. Held, that as one of the trustees resided in *Ohio*, and the deed of trust was executed and acknowledged in that State, and recites that the bonds have been "this day" issued, &c., the inference is that the bonds were negotiated in that State; and there is nothing to show that such a rate of interest was illegal in that State.—*Butler et al. v. Myer*, 77

12. That the place of the delivery of a bond or note, and not the place where it is dated, or signed, is the place of its execution. *Ibid.*

13. That a contract made in one State, to be performed in another, is to be governed by the law of the place of performance, so that if a contract is illegal, on account of usury, by the law of the place where it is made, it may still be upheld by virtue of the law of the place of performance. *Ibid.*

14. *Quære*: Whether a contract, valid by the law of the place where it is made, and where both parties reside, when sought to be enforced in the Courts of the State where it was made, will be held void because the law of the State in which the parties have fixed the place of performance would make it void. *Ibid.*

15. *A.* and *B.* entered into a written contract, whereby the former agreed to pur-

chase of the latter a stock of merchandise, then in store, at the cost price thereof. *A.* was to take up certain notes given by *B.* to divers persons, at a rate not exceeding what the stock would pay if distributed among them and *A.*, according to the amount of their several claims against *B.*; or, if such an arrangement could not be made with the creditors, then *A.* was to give *B.* his note, for such an amount as would have been coming to the creditors if they had accepted the arrangement. Possession of the goods was given to *A.*, the day following the execution of the agreement. Held, that the contract was not an agreement to sell, merely, but an actual sale, upon a consideration to be performed at a future day.—*Conner et al. v. Comstock et al.*, 90

16. Suit against a physician, for malpractice. The complaint averred that the defendant was a practicing physician, and as such, was called on by the plaintiff to visit and treat his child; but contained no averment of any special consideration for the undertaking of the physician, nor any allegation of duty, on which he undertook, &c. Held, that though no special consideration was alleged, the promise to pay a reasonable reward was implied, from the employment; and the duty, on the part of the physician, to exercise a reasonable degree of care and skill, resulted from the character in which he assumed to act.—*Peck v. Martin*, 115

17. The complaint was good, on motion in arrest, the defects, if any, being cured by the verdict; in support of which it will be presumed that the plaintiff, in employing the defendant, became bound by an implied promise, to pay him what his services were worth. *Ibid.*

18. Suit for work and labor. Answer: that the work was done under a parol contract that the plaintiff would receive in payment, one of two designated town lots, which, on the completion of the work and the selection of the lot by the plaintiff, the defendant was to convey to him; that the defendant had always been ready and willing, &c., but that the plaintiff had failed to signify which lot he would take. Held, that the contract was not within the statute of frauds.—*Lingle v. Clemens et al.*, 124

19. A parol contract for the sale of land is

voidable, not void; and payment of the consideration may be such part performance as to take such a contract out of the statute of frauds. *Ibid.*

20. *A.* and *B.* filed their claim before the Board of County Commissioners, for work done in the erection of two stone piers for a bridge. A contract was given in evidence, which, in the introductory part of it, purported to be made between *A.* and *B.*, of the first part, and "*P.*, agent of the counties of *S.* and *W.*," of the other part. After describing the work to be done, &c., the contract provided that the said *P.* should pay the stipulated price in county orders, &c. Held, that as the agreement bound *P.*, and not the counties for which he assumed to be acting, to pay for the work, an action could not be maintained upon it against the counties, without the averment of other facts; as that the contract was accepted and adopted by the counties as theirs.—*The Board of Commissioners of Warrick County v. Butterworth et al.*, 129

21. The failure of the board to have made the preliminary surveys, &c., required by the act of 1855, (Acts 1855, pp. 18, 19,) before letting the contract for the bridge, did not render their acts void, or affect their liability to pay for the work. *Ibid.*

22. A subsequent verbal agreement, changing a previous written agreement, may be valid, and may be proved by parol, in a case where the original contract might have been made by parol.—*Rigsbee v. Bowler*, 167

23. A party can not repudiate a contract on the ground of fraud and, at the same time, retain the benefits derived from it; but must, when he discovers the fraud, restore, or offer to restore, to the other party, what he has received, and failing to do this, he affirms the contract.—*Shaw et al., Administrators of Slocum v. Barnhart*, 183

24. A person entitled to rescind a contract on the ground of fraud, must restore to the other party what has been received, so as to place him in *statu quo*.—*Shepherd et al. v. Fisher et al.*, 229

25. *A.* entered into a contract with the Board of Commissioners of *Greene* county, to build a bridge across *Eel* river, "according to the plans and specifications on file

in the auditor's office;" the third payment on the work was to be two thousand dollars, and was to be paid when the stone work was completed. At a regular meeting of the board, held December 5, 1859, it was ordered, "that the treasurer pay to *A.* two thousand dollars, it being the third payment on said contract." The auditor refused to issue the warrant, and to a proceeding by *A.* to compel him to do so, he answered, that after the board had allowed said sum to *A.*, the abutment on the east side of the creek, by reason of inartificial construction, had fallen into the river; that the board, having been called together, rescinded the order for the payment of said sum, &c. Held, that the allowance made by the board was an admission that the work had been done in accordance with the terms of the contract; and the allowance thus made, could not, especially in the absence of, and without notice to, *A.*, be rescinded by the board.—*Lyons, Auditor of Greene County v. Miller*, 250

26. Even if the auditor could have gone behind the allowance of the board, there was nothing in his answer to show that the abutment was not built according to the plans referred to in the contract. *Ibid.*

27. Suit by *A.* against *B.* and *C.*, to recover the value of hogs alleged to have been wrongfully taken by them and converted to their use. *B.* answered, that the property described, at the time it was taken by him, was in the possession of *C.*, to whom the same had been sold and delivered by *A.*, and that *C.* sold and delivered the property to him. *C.* answered, that he had contracted with *A.* for the purchase of the hogs, which were to be delivered to him on the payment of the price, but that he never paid said price, and never had the possession of said hogs, nor any right to the possession thereof, and never directed or authorized any one to convert the same. On the trial, the plaintiff gave in evidence against *B.* the answer of his co-defendant *C.* *B.* gave in evidence a written contract signed by *C.*, as follows, viz., "I have this day bought of *A.*, 16,371 lbs. gross, of hogs, amounting to \$590.48, to be paid for at the pens at *M.*" The Court instructed the jury that the contract, signed by *C.* alone, was not binding on *A.*, because not

signed by him, and did not preclude him from showing by parol testimony that such writing did not embrace the entire contract. *Held*, that as *B.* claimed to derive title from *C.*, the declarations of the latter, by his answer, or otherwise, were not admissible to impeach the title of *B.*, since the declarations of a vendor, made after he has parted with his title, are not admissible to affect any one claiming under him.—*Keith v. Kerr et al.*, 284

28. The charge of the Court, so far as it assumed that the written contract was not binding upon *A.*, was incorrect, since he was a party to the instrument, notwithstanding he did not sign it. *Ibid.*
29. It is only where the written instrument appears on its face to be incomplete, and the proposed extrinsic testimony does not in any degree tend to contradict or vary the terms of the writing, that such extrinsic evidence is admissible to show the whole contract. *Ibid.*
30. The contract given in evidence was incomplete, in not showing where the hogs were to be delivered, and this might have been shown by parol testimony. *Ibid.*
31. *A.*, *B.* and *C.* executed to *D.* a written obligation, by which they acknowledged themselves to be bound to the said *D.* in the sum of \$4,000, which they jointly and severally promised to pay. The condition of the obligation was stated to be, that *D.* had agreed to furnish from time to time, for twelve months from date, to *A.*, such amounts of money as he might desire, to carry on the milling business, not exceeding said sum of \$4,000. *A.*, on his part, agreed to ship to *D.*, for sale, all flour manufactured at his mill during the year, and to pay to *D.* ten cents per barrel for selling, and three cents per barrel for storage, and also such commissions for the use of the money as might be agreed upon. Suit by *D.* upon the agreement. *Held*, that *B.* and *C.* were not bound by the contract for the repayment of any part of the sums of money advanced to *A.*; but that they only engaged that *A.* should ship the flour, and pay the stipulated commissions and storage.—*Simms et al. v. Powell*, 302
32. Street improvements must, under the act of 1857, (Acts 1857, p. 63,) be executed under a contract with the city council; and such contract must be evidenced either by a formal instrument in writing, signed by the parties or their agents, or a written proposition from the contractor, containing all the particulars of a contract, which must be accepted by the council.—*The City of Logansport v. Blakemore*, 318
33. *A.* and *B.* entered into a contract by which the former agreed to purchase and deliver to the latter one thousand sheep. The contract was reduced to writing, and was signed by *A.*, and by two other persons as sureties for him, but was not signed by *B.* Suit by *B.* against *A.* and his sureties, alleging a failure to deliver the sheep. Answer, by the sureties: 1. That they executed the agreement upon the consideration that *B.* should also execute the same on his part, and that he neither signed the agreement, nor paid the money agreed to be advanced thereon. 2. That *B.* did not notify them of the acceptance of their guaranty, nor that he had given credit thereon. *Held*, that the recital in the agreement of the payment of one thousand dollars by *B.*, as part of the consideration of the contract, was not conclusive, but that the fact of the payment might be inquired into.—*Scope et al. v. Forney*, 385
34. If the sureties executed the agreement upon the consideration that *B.* should also execute it, and thus become mutually bound with *A.* for the performance of its conditions, they had a right to insist upon its execution by him, or to claim the benefit of his failure. *Ibid.*
35. An agreement not to sue for a limited time upon a promissory note, is no bar to an action on the note, commenced within the time limited.—*Murphy v. Robbins et al.*, 422
36. *A.* sold to *D.* a tract of land for \$1,200, of which one half was paid in cash, and three notes given for the residue. *A.* indorsed one of the notes to a third person, who sued upon it, but was defeated because the deed tendered by *A.* was not executed by his wife. An agreement was then made between *A.* and *B.*, by which the latter agreed to accept the deed, without the wife's signature, and to pay to *A.* the amount of the note which had been sued upon, and for which *A.* was liable on his indorsement, and also one other of the

three notes, the third being at the time surrendered to him by *A. Held*, that the conveyance of *A.*, without the wife's signature, was a sufficient consideration to support the agreement.—*Friermood et al. v. Pierce, Administrator of Rouser*, 461

37. Suit upon a promissory note. Answer: that at and before the assignment of the note to the plaintiff, the payee thereof, one *G. W.*, was indebted to the defendant in the sum of \$850, by a written contract executed by him, as follows, viz., "I, *G. W.*, Land Agent of the *Ohio and Mississippi Railroad Co.*, agree to pay to *A.* six hundred dollars for waste grounds, which cover some eight town lots on the south side of the railroad; also, two hundred and fifty dollars for waste grounds and wood yard on the north side of the road. Witness my hand and seal." (Signed) "*G. W.*, Land Agent," [SEAL.] Reply: 1. Want of consideration. 2. That the indebtedness pleaded as a set-off is the indebtedness of the railroad company, a corporation authorized to make such contracts; that the consideration thereof moved to said company, and not to the said *G. W.*, who was only the agent of said company, and, as such, had power to make such contracts, and was in the habit of signing said contracts in the form aforesaid; all of which was well known to the defendant. On the trial, the plaintiff produced a witness who testified that the consideration of said last named contract was that the defendant should convey to the company, in fee simple, the premises therein described, and that no such conveyance had been made. *Held*, that the evidence introduced to show that the defendant had not kept his part of the written contract pleaded by him, by conveying the land to the company, was improperly admitted, there being no reply setting up the facts constituting the alleged failure.—*Prather et al. v. Ross*, 495

38. It was competent for the defendant to prove, by a witness shown to be a resident of the neighborhood, and to be acquainted with the technical terms used in the construction of railroads, that the terms, "waste ground," meant earth or other material excavated from the bed of the road, and deposited on the ground adjoining. *Ibid.*

39. Where a question of construction of a

writing arises from the obscurity of the writing itself, it must be determined by the Court, alone; but questions of usage, custom, and actual intention and meaning derived therefrom, are for the jury. *Ibid.*

40. In order to bind the principal, and make it his contract, the instrument must purport on its face to be the contract of the principal, and his name must be inserted therein, and signed thereto, and not merely the name of the agent, even though the latter be described as agent; and hence, the contract pleaded as a set-off was not the contract of the railroad company, but the individual contract of the plaintiff. *Ibid.*

41. Suit by *A.* against *B.*, the mortgagor, and *C.*, the owner of the equity of redemption, to foreclose a mortgage. *C.* answered that *A.* had purchased the land of a railroad company and conveyed it to *B.*; that the title of the company came to be disputed, and that it was agreed by *A.*, in consideration that *C.* would purchase the mortgaged premises, and assume the payment of the mortgage, that he, *A.*, would procure from the grantor of the railroad company a conveyance to *C.*, to cure said supposed defect in the title, and that the time of payment of the mortgage should be extended until such conveyance was obtained; that *A.* had never procured said deed, &c. *Held*, that the answer presented a good defense to the action.—*Branham v. Cossett*, 502

42. The word "contract" as used in § 23 of the act to authorize and regulate the business of general banking, (Acts 1855, p. 39,) which provides that "contracts made by such association and all bills," &c. "shall be signed by the president or vice-president, and cashier thereof," is employed in a limited, and not in its broad sense; and does not include a contract of indorsement of a note, which may, according to the usage of banks, be made by the cashier alone.—*Jones v. Hawkins*, 550

43. The act of June 4, 1861, (Acts Spec. Sess. 1861, p. 79,) providing for the redemption of real property sold upon execution, &c., so far as the same was intended to apply to sales on judgments rendered upon contracts existing at and before its passage, is in conflict with Art. 1, § 10 of the Constitution of the United

States, which prohibits the passage of any law impairing the obligation of contracts.—*Scobey v. Gibson*, 572

44. Suit by *A.* against *B.*, before a justice of the peace, upon a writing as follows, viz., "Twelve months after date, I promise to pay to the order of *A.*, the sum of eighty dollars and fifty cents, value received; but should the beast prove unsound, a deduction to be made by two disinterested persons." Signed by *B.* This instrument had been assigned in writing to *A.*, and *C.*, the assignor, was made a defendant to answer as to his interest; but, on motion of the defendant, his name was stricken out. Answer: 1. That the note was given for the price of a horse, which was represented and warranted to be sound, &c.; that, in fact, said horse was unsound, &c., by reason of which the consideration of said note had failed. 2. That after the defendant had discovered the unsoundness of the horse, he had requested *C.* to select an appraiser, which he refused to do, and that defendant then had said horse appraised, and tendered to *C.* the amount of such appraisal, and now brings the same into Court, &c. The defendant also filed a paper stating that he waived the general denial put in by statute, and all matters of defense, except those by him specially pleaded. *Held*, that there was nothing in the writing to prevent proof being made of a warranty of the horse, but when a warranty was once established, the contract prescribed the remedy for a breach, viz., by deduction from the amount of the note, and neither party could insist upon a return of the horse.—*Cross v. Pearson*, 612

CONVERSION.

Of Promissory Note. See PROMISSORY NOTE, 13.

CONVEYANCE.

See DEED, 2, 3, 4.

To Defraud Creditors. See FRAUD, 3. HUSBAND AND WIFE, 1, 2.

Recording of. See HUSBAND AND WIFE, 3, 4.

CORPORATION

1. Suit upon a promissory note. Answer: that the note was given for certain shares

of the capital stock of *The Fort Wayne and Southern Railroad Company*, and that at the time of giving the same the said corporation had no legal existence, in this: that said company was authorized by an act of the Legislature, in 1849, but did not act upon or accept said charter until November 19, 1852, before which time the new Constitution had gone into force, prohibiting the creation of corporations, other than banking, by special act. *Held*, that the organization of the company was a naked assumption, without authority of law, or semblance of right.—*Gillespie v. The Fort Wayne, &c. Railroad Co.*, 243

2. A promise to a body or organization of men, professing to act as a corporation, in an instance, or under circumstances, where by law a corporation of that character could not have a legal existence, does not estop the person making it from showing the facts. *Ibid.*
3. Where, to an action by a corporation, the defendant pleads the general issue, he admits the capacity of the plaintiff to sue, and can not, at the same time, plead *nul tiel corporation*, because a plea in abatement can not be pleaded in connection with a plea in bar.—*Carpenter et al. v. The Mercantile Bank*, 253
4. The creditors of a corporation have a right to pursue its stockholders, even after its corporate existence has ceased.—*Bish v. Bradford*, 490
5. All corporations organized under the provisions of the act of June 15, 1852, establishing general provisions respecting corporations, (1 R. S. 1852, p. 239,) are considered as in being for three years after they shall have ceased, legally, to exist, for the purpose of their organization, in order that the affairs of such corporation may be properly closed up, if necessary, by suits to be conducted in the name of the defunct body.—*Herron, Receiver of the Savings Bank of Indiana v. Vance et al.*, 595
6. As corporations might be organized under the act of June 15, 1852, *supra*, of such a character as to fall within the class of "moneyed corporations," as intended by § 28 of the act to regulate the business of general banking, (1 R. S. 1852, p. 159,) it appears to follow that so far as proceedings to dissolve corporations for

banking purposes, and the appointment and duties of a receiver are governed at all by special statute, the act establishing general provisions respecting corporations, (1 R. S. 1852, p. 239,) should maintain.

Ibid.

7. *Quere*: Whether, in view of these statutes, any averments could be made in a complaint showing authority to prosecute or defend suits within three years, in the name of a receiver, or in any name other than that of the corporation. *Ibid.*

8. The liability of each stockholder for the shares of stock subscribed by him, is several, and not joint with the other subscribers; and hence, a joint suit for the collection of the amounts due upon subscription will not lie; but where there is an averment of the insolvency of the corporation, and a prayer for the settlement of its affairs, all the stockholders may be joined in one suit, under an order of the proper court to that effect, so as to adjust the whole affairs of the corporation, and determine their respective rights and liabilities, and cross equities. *Ibid.*

9. The complaint should, in such case, be accompanied by a copy of the articles of association of the bank, and should contain proper averments of the liability of each person whose signature appears thereto. *Ibid.*

COSTS.

When Claim reduced below \$50. See STATUTES CONSTRUED, 23.

No Imprisonment for. See INDICTMENT, 5.

1. Where one party, without objection, permits the other to examine witnesses upon immaterial or irrelevant matters, he is himself in default, and can not afterward have the costs of such witnesses taxed against the party introducing them.—*Voltz v. Newbert et al.*, 187

2. A motion to tax costs can not be noticed in the Supreme Court, unless there be a bill of exceptions showing the ruling of the Court below.—*Urton v. Luckey*, 213

3. The statute seems to contemplate that the record of the Court of Conciliation shall only affect the question of costs, and hence it may be given in evidence to the Court, instead of the jury, to enable it to determine which party shall be taxed with the costs.—*Strange v. Prince*, 524

COUNTY COMMISSIONERS.

See CONTRACT, 25, 26.

1. *A.* and *B.* filed their claim before the *Board of County Commissioners*, for work done in the erection of two stone piers for a bridge. A contract was given in evidence, which, in the introductory part of it, purported to be made between *A.* and *B.*, of the first part, and "*P.*, agent of the counties of *S.* and *W.*," of the other part. After describing the work to be done, &c., the contract provided that the said *P.* should pay the stipulated price in county orders, &c. *Held*, that as the agreement bound *P.*, and not the counties for which he assumed to be acting, to pay for the work, an action could not be maintained upon it against the counties, without the averment of other facts; as that the contract was accepted and adopted by the counties as theirs.—*The Board of Commissioners of Warrick County v. Butterworth et al.*, 129

2. The failure of the board to have made the preliminary surveys, &c., required by the act of 1855, (Acts 1855, pp. 18, 19,) before letting the contract for the bridge, did not render their acts void, or affect their liability to pay for the work. *Ibid.*

3. Suit by the *Board of County Commissioners* against *A.*, the former treasurer of the county, alleging that while he was such treasurer he collected, between the third Monday of March and the first Monday of August, of a certain year, taxes due said county to the amount of, &c., upon which there was chargeable by law ten per cent., as damages, which he was bound as such treasurer to collect and account for to the auditor, and pay into the treasury; that he failed to receipt to said auditor for the same, or to pay the same into the treasury, or otherwise legally to account therefor. Answer: 1. That at the *June* term of the board, held on, &c., the defendant settled in full with said board, and accounted for all taxes and penalties due and owing to said county. 2. That the cause of action did not accrue within three years next before the bringing of the suit. *Held*, that the treasurer was required by § 13 of the act relative to county treasurers, (1 R. S. 1852, p. 501,) to make an annual settlement with the board at their *June* term; and the board, having by law a supervisory control

over the finances of the county, had power to settle with the treasurer, and to bind the corporation by such settlement.—*The Board of Commissioners of Posey County v. Saunders*, 437

4. The complaint can not be understood to charge the treasurer with having collected the ten per cent. damages; and hence the case made was not within the exception to sub. § 2 of § 211, 2 R. S., p. 75, by which an action is allowed within six years, against an officer, or his representatives, for money collected in an official capacity. *Ibid.*

COUNTY TREASURER.

Must Settle Taxes Annually. See COUNTY COMMISSIONERS, 3.

COURT, CIRCUIT.

See CIRCUIT COURT.

Adjourned Term. See ADJOURNED TERM, 1, 2.

COURT OF CONCILIATION.

1. The statute seems to contemplate that the record of the Court of Conciliation shall only affect the question of costs, and hence it may be given in evidence to the Court, instead of the jury, to enable it to determine which party shall be taxed with the costs.—*Strange v. Prince*, 524
2. Where the statement of the judge of a court of conciliation as to the identity of the record of his court was received in the Court below without putting him under oath as a witness, it must be presumed that the parties waived the administration of the oath. *Ibid.*
3. Where the record of a court of conciliation recites that the parties appeared, the notice need not be set out. *Ibid.*

COURT OF COMMON PLEAS.

See LIQUOR, 1.

Appointment of pro tempore Judge. See RECORD, 1.

1. Section 15 of the act fixing the times of holding the Courts of Common Pleas, (Acts 1859, p. 84,) authorized a Court to be held in *Tippecanoe* county, in *December, 1860*, the law having gone into force in *October* of that year; and did not require that the Courts should begin, under that

law, in the order of the months named, viz., *March, June and December.*—*Phillips et al. v. Stewart*, 154

2. The Common Pleas act of 1859, (Acts 1859, p. 89,) requires writs in that Court to be made returnable on the first day of the term, but the naming of a wrong day, in the right term, in the writ, is a mere clerical error, which would work no prejudice, the defendant being supposed to know the law; but a writ made returnable to a wrong term, or made to run past a term, would be void.—*Rigsbee v. Bowler*, 167

3. The act of 1859 gives the Court of Common Pleas a jurisdiction unlimited as to amounts.—*Jenkinson v. Ewing*, 505

COVENANT.

Damages for Breach of Warranty. See DAMAGES, 5, 6, 7, 9.

1. When a party covenants to perform certain acts, other than the payment of money, the failure to perform which may occasion damages uncertain in amount, the parties may agree in advance as to what the damages shall be taken to be.—*Brown v. Maulsby et al.*, 10
2. Where a deed is made and accepted, and possession taken under it, want of title in the vendor will not enable the purchaser to resist the payment of the purchase money, or recover more than nominal damages on the covenants of the deed, while he retains the deed, and possession of the land, and has been subjected to no inconvenience or expense.—*Hacker v. Blake et al. Administrators of Butcher*, 97
3. An entire want of title in the grantor, is a breach of a covenant of seizin, but while the purchaser retains possession, he can only recover nominal damages; and for such damages, a cause will not be reversed in the Supreme Court. *Ibid.*
4. Suit for the purchase money of real estate. Answer: that the premises were, at the time of the conveyance, incumbered by a lien for taxes, which the defendant had been compelled to pay. *Held*, that the answer was bad for not showing that the conveyance contained a covenant against incumbrances.—*Jenkinson v. Ewing*, 505

CRIM. CON.

In an action for *crim. con.*, it is not competent for the defendant to prove facts going to show that there was no affection existing between the plaintiff and his wife, at and before the time of the alleged seduction.—*Dallas v. Sellers*, 479

CRIMINAL LAW.

See INDICTMENT. INFORMATION. FORGERY.

1. The Court of Common Pleas has jurisdiction in felonies, only in certain specified cases, and the information must show, on its face, such a state of facts as entitles the Court to entertain such jurisdiction.—*Justice v. The State*, 56
2. The information must show that the felony, on charge of which the defendant is alleged to be in custody, is the same felony for which the information is filed. *Ibid.*
3. Where a party is charged with a felony, in a Court not having jurisdiction over the subject matter, the defect of jurisdiction can be taken advantage of on motion to quash, or, in arrest of judgment, or, on appeal. *Ibid.*
4. Section 90 of the act to revise the rules and practice in criminal cases, (2 R. S. 1852, p. 372,) which provides that "all persons who are competent to testify in civil actions," shall also be competent witnesses in criminal cases, was intended to adopt the law as it then stood, upon the subject of the competency of witnesses in civil actions; and hence the law of 1861, (Acts 1861, p. 51,) admitting parties to testify in civil actions, does not apply to criminal cases.—*Hoagland v. The State*, 488
5. An information for a felony, in the Court of Common Pleas, must show that the defendant is in custody on a charge of the felony for which the information is filed, and must negative the finding of an indictment against him.—*Kreigh v. The State*, 495

CROSS-COMPLAINT.

See PARTITION, 9.

D.

DAMAGES.

Consequential. *See* STREETS, 13, 14.

Excessive. *See* EVIDENCE, 26.

1. When a party covenants to perform certain acts, other than the payment of money, the failure to perform which may occasion damages uncertain in amount, the parties may agree in advance as to what the damages shall be taken to be.—*Brown v. Maulsby et al.*, 10
2. A promise to pay money does not fall within the class of cases to which the doctrine of liquidated damages applies; the rate of interest allowed by law being the measure of damages for delay in the payment of money. *Ibid.*
3. Where a deed is made and accepted, and possession taken under it, want of title in the vendor will not enable the purchaser to resist the payment of the purchase money, or recover more than nominal damages on the covenants of the deed, while he retains the deed, and possession of the land, and has been subjected to no inconvenience or expense.—*Hacker v. Blake et al., Adm'rs of Butcher*, 97
4. An entire want of title in the grantor, is a breach of a covenant of seizin, but while the purchaser retains possession, he can only recover nominal damages; and for such damages, a cause will not be reversed in the Supreme Court. *Ibid.*
5. Where there is an entire failure of title to real estate conveyed with covenants of warranty, the measure of damages for a breach of the covenants, in the absence of fraud, is the purchase money and interest.—*Phillips et al. v. Reichert*, 120
6. If the eviction is partial only, the damages will bear the same proportion to the whole purchase money, that the value of the part to which the title failed bears to the whole premises, estimated at the price paid. *Ibid.*
7. The fact that the land was bought for a particular purpose, which was known to the vendor, can make no difference in respect to the rule of damages for a breach of the covenants. *Ibid.*

8. *Quære*: Whether the vendee might not rescind the contract, on a failure of the title to that part which constituted the principal inducement to the purchase. *Ibid.*
9. The basis of damages, in case of a partial failure of title, should be the relative general value of the part to which the title has failed, compared with the whole, without limitation of the purposes to which it may be applied, or for which it may have value. *Ibid.*
10. Suit to recover for deceit in the sale of a yoke of cattle. The complaint averred, that "the defendant well knowing the premises, and intending to cheat and defraud the plaintiff, falsely and fraudulently represented to him, that the cattle were gentle," &c. The Court instructed the jury, that if they found the defendant had been guilty of a fraud upon the plaintiff, they might assess exemplary, or smart damages, in addition to compensatory, or actual damages. *Held*, that the instruction was correct; the rule being, that where the offense is not punished by the criminal law of the land, and where the elements of fraud, malice, gross negligence, or oppression, mingle in the controversy, the jury may give vindictive or exemplary damages.—*Millison v. Hoch*, 227

DEED.

See COVENANT, 2.

Recording of. See HUSBAND AND WIFE, 3, 4.

Record of, is Constructive Notice. See NOTICE, 1, 2, 3.

1. *A.*, by his will, devised certain real estate to his wife for life, and at her death to be sold by his executor to the highest bidder among his children. The widow leased the land for the term of her life to one *B.*, who, after her death, continued in possession as a tenant at sufferance. In September, 1858, the executor sold the land to a child of the testator, who assigned his certificate of purchase to *C.*, a married woman. The sale was confirmed by the Court, January 3, 1859, and the executor ordered to make a deed to *C.*, which he did on March 7, 1859. Suit by *C.* and her husband against *B.*, alleging, that on January 4, 1859, and on divers other days, between that day and March 10, 1859, the said *B.* wrongfully, and without license, turned a large number of hogs upon a meadow, part of said real estate, whereby the same was rooted up and injured; and also dug up and carried away a large number of fruit trees. *Held*, that the husband was properly joined with the wife, as plaintiff.—*Bellows et al. v. McGinnis*, 64
2. That when the deed was executed, it related back to the time the sale was confirmed and the deed ordered, so as to vest in *C.* the same rights as if the deed had been executed and delivered. *Ibid.*
3. If a conveyance be made to a third person, in satisfaction of illegal claims taken up by such third person, at the request of the grantor, such conveyance is upon a valid consideration; and, in this case, there was such a consideration, even if the bonds were void for usury.—*Butler et al. v. Myer*, 77
4. If a debtor makes a conveyance of his land to his creditor in satisfaction of a usurious debt, the deed, being an absolute conveyance and not a mortgage, can not be avoided for the usury. *Ibid.*
5. A person purchasing of a commissioner appointed to sell real estate, in proceedings for partition, is not entitled to a deed under the statute, until the purchase money has been paid.—*Swain et al. v. Morberly*, 99
6. *A.*, as commissioner, &c., executed to *B.* a certificate, as follows: "I do certify that *B.* has purchased the following real estate, (describing it,) for the price of, &c., for which he has given his notes with security, and that he is entitled to a deed for the same when this sale is confirmed by the Court." The sale was confirmed by the Court, and without making a deed, *A.* sued for the purchase money. *Held*, that the certificate did not purport to be a contract, binding upon *A.*, and did not bind him to cause a deed to be made, but simply certified that the purchaser would be entitled to a deed, if the sale was confirmed; and a tender of a deed before suit for the purchase money, was not necessary. *Ibid.*
7. A title deed is a personal chattel, but is so connected with, and essential to, the

- ownership of real estate, that it descends with it to the heir. — *Wilson et al. v. Rybolt*, 391
8. The possession of title deeds may be recovered in the action provided by the code for the recovery of personal chattels; and as the jurisdiction of justices of the peace, as to the character of the articles of property sought to be recovered, is equally extensive with that of the higher courts, title deeds may be recovered in an action of replevin in a justice's court. *Ibid.*
9. If a deed was once executed and delivered by C. to A. and B., the surrender of the deed to the former would not revest the title in C. — *Schaffer et al. v. Fithian et al.*, 463
10. Suit upon a promissory note. Answer: that the note was given for the purchase money of real estate sold by title bond, and that the deed, which was to have been executed on payment of the note, had not been tendered. On the trial, the truth of the answer being established, the Court held the case under advisement until a deed could be made and tendered, and then gave judgment for the plaintiff. *Held*, that this was erroneous. — *Cook v. Bean, Adm'r of Burlbridge*, 504
11. A. and B. entered into an agreement, in writing, by which A. agreed to sell and convey to B. a certain town lot, in consideration that B. would convey to him eighty acres of land in Jasper county. The land was to be selected as follows, viz., B. was to furnish to A. five hundred acres of land in said county, from which A. was to select an eighty acre tract; and when so selected, and a deed made for the same, then A. was to convey to B. the town lot, and give him possession at a given time. Suit by B. for a specific performance of the agreement, alleging that he had said five hundred acres of land, and furnished a description thereof to A., and requested him to make a selection therefrom, which he failed and refused to do, and by reason of such refusal he could not make and tender a deed, &c. *Held*, that an application for a specific performance is addressed to the sound legal discretion of the Court, and as B. had not tendered a conveyance for any particular tract, and did not make any averment as to the value of the lands, or give any description of the lands furnished to A., from which to choose, a case was not made in which the Court could determine whether a specific performance could, or not, be equitably decreed. — *Kirkman v. Kenyon et al.*, 607

DEFAULT.

See DIVORCE, 1.

A judgment having been regularly entered by default, on the second day of the term, the defendant appeared on the fifth day, and moved, on affidavit, to set the default and judgment aside. The affidavit disclosed the defense of usury, and alleged that defendant had, before the first day of the term, employed counsel, upon whom he relied to make his defense, &c. *Held*, that such motions are left, in great part, to the discretion of the Court below, and that there was no abuse of such discretion in overruling the motion, the affidavit being defective in not showing that the facts were disclosed to the attorney. — *Hazebriigg et al. v. Wainwright*, 215

DELIVERY.

Essential to Title by Gift. *See* GIFT, 1.

DEMAND.

Before Suit. *See* PRACTICE, 16.

1. An action of replevin will not lie to recover the possession of goods from one who has purchased them in good faith, of a wrong doer, without a previous demand by the true owner. — *Conner et al. v. Comstock et al.*, 90
2. Where real estate is sold by title bond, the purchaser is not, in the absence of a stipulation to that effect, entitled to the possession of the land before the time for making the conveyance, and though he may have entered into possession with the consent of the vendor, the latter may resume his possession at any time, on demand. — *Kratemayer v. Brink*, 509
3. Where the vendee of real estate enters into possession under the contract of purchase, with the consent of the vendor, such entry does not constitute him a tenant. *Ibid.*
4. A reply averring a demand of possession after entry, and before suit brought, is sufficiently certain, on demurrer. *Ibid.*

DEMURRER.

1. Where a party amends his pleading after a demurrer has been sustained to it, he can not complain of the action of the Court on the demurrer.—*St. John v. Hardwick*, 180
2. If a demurrer be to the whole pleading, and there is one good paragraph, it should be overruled.—*Urton v. Luckey*, 213
3. Where a cause is submitted to the Court for trial, there being an issue of law upon demurrer undisposed of, it will be presumed that the issue was decided in the general finding; but it is error to proceed to the trial of issues of fact before a jury, when issues of law remain undisposed of.—*Anderson et al. v. Weaver*, 223
4. A party by amending his plea, after a demurrer has been sustained to it, waives his right to complain of the sustaining of the demurrer. Section 382 of the code applies, alone, to demurrers overruled.—*Jay et al. v. The Indianapolis, &c. Railroad Co.*, 262
5. Defect of parties, as a cause of demurrer under the code, means too few, not too many, parties.—*Bennett v. Preston et al.*, 291
6. If a complaint states a cause of action against one or more of several defendants, a joint demurrer by all the defendants, on the ground that the complaint does not state facts sufficient, or for defect of parties, can not be sustained; but the defendants against whom no cause of action is stated, may demur on that ground, separately. *Ibid.*
7. A demurrer for want of sufficient facts will be overruled, if, on the facts stated, the plaintiff is entitled to any relief whatever, although not to that demanded. *Ibid.*
8. A defect in the prayer for relief is not ground of demurrer, but for a motion to make more specific. *Ibid.*
9. Suit upon a promissory note for \$406. Answer, as to the whole cause of action, that \$100 of the consideration of the note was for usurious interest. *Held*, that the answer was bad, for pleading in bar of the whole action, facts that were a bar, at most, only to the amount of \$100, and the interest and cost, and that the defect was reached by demurrer.—*Webb et al. v. Deitch et al.*, 340
10. A demurrer in the following form, viz., "Comes now said plaintiff and demurs to the second paragraph of the defendant's answer, and says that the same is not sufficient in law to enable the defendant to sustain his said defense, or to bar the plaintiff's complaint," is bad, as no statutory cause of demurrer is assigned.—*Tenbrook v. Brown*, 410
11. Where the defendant amends his answer, after a demurrer has been sustained to it, he waives all right to complain of the ruling on the demurrer.—*Ham et al. v. Carroll*, 442
12. A judgment can not be reversed for error committed in sustaining or overruling a demurrer for misjoinder of causes of action.—*Knoolton et al. v. Murdock*, 487

DEPARTURE.

Suit against the sureties of an administrator, on a bond given by him on an application to sell real estate, to recover the proceeds of the land sold. Answer: that the administrator, in his lifetime, fully paid and accounted for all of said moneys, except the sum of \$892, which the defendant as his surety has since paid in full. Reply: that after the payment of said alleged balance by the surety, a further accounting took place in the Court of Common Pleas, in the matter of said estate, and by the judgment of said Court said administrator was found in arrears, over and above said supposed balance, in the sum of \$1,125. *Held*, that the reply was a departure, as the money therein sought to be recovered was not shown to have been of the proceeds of the real estate sold, for which only the surety was liable.—*Burtch v. The State, ex rel. Richardville*, 506

DEPOSITION.

1. Where the deposition of a witness residing in a county adjoining to that in which a cause is pending, has been taken by agreement of the parties, it may be read in evidence on the trial, without showing any reason for the non-production of the witness.—*Griffin v. Templeton*, 234
2. A notice to take depositions "at the post office in the town of America, in Kansas

Territory," is sufficiently certain as to the place of taking, it not being shown that there was another town of that name in the territory, or that the party was in any way misled by the notice.—*Hobbs v. Gallove et al., Executors of Godlove*, 359

3. Section 261 of the code contemplates that a *dedimus* may issue without naming the officer before whom the depositions are to be taken, and also without designating his official character. *Ibid.*
4. It is not material that the *dedimus* in naming the defendants does not show that they are sued as administrators, where it does not appear that the party was misled by the pendency of another suit against the same parties. *Ibid.*

DESCENTS.

1. *A.* died intestate, and without issue, leaving his widow, and his father and mother, surviving. His estate consisted of \$334 of personal property, and real estate valued at \$1,800, which had been conveyed to him by his father in consideration of natural love and affection. Two thirds of the land was sold on petition of the administratrix, to pay debts, leaving one third to the widow; and the surplus after the payment of debts, and \$300 to the widow, was, by order of the Court, distributed, one fourth to the father and mother, and three fourths to the widow. *Held*, that under § 7, of the act regulating the apportionment of estates, &c., (1 R. S., p. 249,) the father was entitled to the reversion of the land, subject to the rights of the widow therein; which means her ordinary right to one third of the real estate left by her deceased husband.—*Mitchell et al. v. Parkhurst, Administratrix of Mitchell*, 146
2. The overplus remaining after the payment of debts, being of the proceeds of the sale of the land, belonged to the father, because, in the absence of such a sale, he would have been entitled to the entire two thirds, as a reversioner in fee simple. *Ibid.*
3. *A.* died intestate, in the year 1835, seized of certain real estate, leaving an only child, *E.*, and his widow, surviving him. In the following year *B.* died intestate, leaving no issue, and without brothers and sisters, or their descendants, alive, but leaving uncles and aunts, who were all brothers and sisters of the half blood of her father. The father of *A.* was married twice, having by his first marriage two children, *C.* and *D.*, and by his second marriage one child, the said *A.*; he then died himself, and his widow married again and had two children, *E.* and *F.* The said *C.*, *D.*, *E.* and *F.*, the uncles and aunts of *B.*, of the half blood of her father, were living at the time of her decease. After the death of *B.*, her mother married again, and had issue. Suit by *E.* and *F.* against the vendees of *C.* and *D.* to recover one half of the land. On the trial, the defendants offered in evidence the record of a suit in chancery, brought by *C.* and *D.* against *E.* and *F.*, and others, to obtain distribution of the personal estate of *A.*, and also to obtain a decree that the complainants were entitled to the lands left by *B.*, to the exclusion of *E.* and *F.*, and for partition, &c. The bill was filed in the office of the clerk of the Circuit Court, in December, 1839, and notice thereof given by the petitioners by publication in a newspaper. The suit was called in the notice, after entitling the cause, "Bill of partition of real estate," and notified the defendants that the petitioners had filed their petition for partition, according to law, among those entitled, of the real estate of which *B.* died seized," &c. The notice was signed by the petitioners, and, together with an affidavit of its publication for four weeks, &c., was filed in Court, and the record recites that "it appearing to the satisfaction of the Court that said publication was made," &c., "thereupon, on motion, the defendants were defaulted," &c. It was therefore ordered and decreed that *C.* and *D.* were the heirs of *B.*, and that the title of said lands be vested in them. *Held*, that on the death of *B.* the land descended to the brothers and sisters of her father; and that they were of the half blood, only, could make no difference; nor could the fact that *E.* and *F.* were half brothers of *A.* through the maternal line make any difference as to their rights, as they were equally related to *B.* with the said *C.* and *D.*—*Cox et al. v. Matthews et al.*, 367
4. The doctrine of shifting descents never prevailed in this State, but where the descent is cast, and the estate vested in him who is the heir at the death of the

ancestor, the estate can not be divested by the subsequent birth of nearer heirs; and hence, the half brothers and sisters of *B.*, born after her decease, not being *in ventre sa mere*, could not take the estate from the uncles and aunts of *B.*, in whom it had vested. *Ibid.*

DILIGENCE.

To hold Assignor. See PROMISSORY NOTE.

DISMISSAL.

In Vacation. See PRACTICE, 19.

In a proceeding to enforce a mechanic's lien, after the jury had been sworn, and the evidence heard, the Court permitted the plaintiff to enter a dismissal as to some of the defendants, so far as a personal judgment was sought against them, but to continue them as parties to the proceedings to enforce the lien. *Held*, that there was no error in this.—*Scoville et al. v. Chapman*, 470

DISTRICT ATTORNEY.

County not liable for Docket Fees of. See FEES, 1.

DIVORCE.

1. Suit for a divorce, by a husband against his wife, charging cruel treatment, &c. The defendant answered, admitting the allegations of the complaint; and an agreement was made and filed by the parties, relating to the disposition of their children and property. The cause was submitted to the Court upon the pleadings and said agreement, without other evidence, and a divorce was refused. *Held*, that under the general chancery practice, a default did not, in suits for divorce, as in other suits, supersede the necessity of proof, or lighten the burden resting on the plaintiff to establish the charges preferred; but a default, acknowledgment, or consent for judgment, by the defendant, it was generally supposed, settled the case as against him, so that he could not complain of any lawful disposition the Court might afterward make of it.—*Scott v. Scott*, 309
2. It would appear to follow that if the defendant, being the wife, should admit of record the charges in the complaint enti-

ling the plaintiff to a divorce, she would deprive herself of the right, under our statute, to an order for alimony, during the pendency of the proceedings. *Ibid.*

3. Public interests, and the rights of third persons not before the Court, require that the State shall exercise some control over the marital relation, and that suits for divorce are not mere actions between the parties to the marriage contract, to be governed by the ordinary rules of procedure in civil suits; and hence, our law requires the prosecuting attorney to resist all applications for divorce, that are not otherwise defended. *Ibid.*
4. The Court below did not err in refusing a divorce. *Ibid.*

DOWER

See WILL, 5, 6, 7.

DUPLICITY.

Objection to, is by motion to strike out. See PRACTICE, 35.

E.

EJECTMENT.

1. Where, in an action to recover the possession of real estate, the defendant appears and pleads to the action, his possession of the land, described in the complaint is admitted, under § 597, 2 R. S., p. 167, and hence evidence of the boundaries of the land is irrelevant.—*Volta v. Newbert et al.*, 187
2. The act of 1855 (Acts 1855, p. 57) amending § 596, 2 R. S., p. 167, was not intended to change this rule, or increase the amount of evidence, but only to change the mode of pleading. *Ibid*

ELECTION.

To treat paper as Promissory Note or Bill of Exchange. See BILLS OF EXCHANGE, 1.

1. Section 21 of the general election law (1 R. S. 1852, p. 263) was intended to, and does, preclude the election board from taking testimony relative to the right of any person to vote, who may offer to take the oath therein prescribed.—*The State v. Robb*, 536

2. It is the duty of the inspector or judge to state to one who offers to vote and is challenged, the requisites to entitle him to cast such vote; if he still persists in his offer, and swears, or offers to swear, they can refuse to swear him, and even after they have sworn him may refuse his vote, but they do so at the peril of being able to show that he was not a legal voter, upon a prosecution for refusing the vote. *Ibid.*
3. The board are only liable for the rejection of a *legal* vote, and though the person offering to vote may have taken the oath, yet the penalty for rejecting his vote would not attach if the board should be able to show that he was not a legal voter. *Ibid.*
4. When the person offering to vote takes the prescribed oath, the board are justified in receiving his vote, unless it can be shown that they acted corruptly, and were cognizant of the fact that he was not a legal voter. *Ibid.*
5. On September 28, 1861, *A.*, who was the judge of the Court of Common Pleas for the 12th District of the State of *Indiana*, vacated said office, and on September 30, the vacation of said office became constructively known to the public, through the appointment of *B.* by the Executive of the State, as the successor in said office, and the entering of *B.* upon the duties of said office. On Tuesday, October 8, the general annual election for the State took place, and at such election votes were cast for *B.* and *C.*, as follows, viz., for *B.* 3,799 votes, and for *C.* 4,189 votes. Suit by *B.* against *C.* and the Governor of the State, to enjoin the latter from issuing a commission to *C.* and the former from acting as judge of said Court. *Held*, that the first section of the act regulating general elections, &c., (1 R. S. 1852, p. 260,) which provides that existing vacancies in office shall be filled at the annual general election, is so limited by the second section of said act, which prescribes the notice to be given of a general election, that an election to fill a vacancy can not legally be held where the vacancy did not occur long enough before the day of election to enable the steps required by the statute, as to notice, &c., to be taken.—*Beal v. Ray et al.*, 554
6. The courts could not aid by mandamus an officer illegally elected to get posses-

sion of the office to which he claims to be elected. *Ibid.*

7. A case was not made entitling *B.* to a remedy by injunction to restrain the Executive from issuing a commission to *C.* *Ibid.*

ERROR.

1. An assignment of error in these words, viz., "The judgment should have been for the defendant instead of the plaintiff, and should have sustained the motion for a new trial," though not artistically drawn, is sufficient to bring in review the decision of the Court, on the motion for a new trial.—*Henry v. Coats*, 161
2. Errors of law occurring at the trial, can not be assigned for error in the Supreme Court, unless they were made the ground of a motion for a new trial in the Court below.—*Voltz v. Newbert et al.*, 187
3. Errors of law occurring on the trial, which do not appear to have been in some way brought to the attention of the Court below, will not be noticed in the Supreme Court.—*Norton et al. v. Hooten*, 365
4. Motion for a new trial, for the following causes, viz., "1. Irregularity in the proceedings of the Court. 2. Error of law occurring at the trial, and excepted to by the defendant." *Held*, that the causes assigned were too general to present any point for the consideration of the Supreme Court.—*Phelps v. Tilton*, 423
5. Errors of law occurring on the trial, as in the refusal to grant a continuance, or in the admission of improper evidence, must be assigned in the motion for a new trial, or they can not be noticed on appeal.—*Scoville v. Chapman*, 470
6. Motion for a new trial upon the following grounds, viz., 1. "For irregularities in the proceedings of the Court, and abuse of discretion, by which the defendants were prevented from having a fair trial. 2. On account of accident and surprise, which ordinary prudence could not have guarded against. 3. Errors of law occurring at the trial, and excepted to." *Held*, that the reasons assigned were too vague and

indefinite to bring any question to the attention of the Court. *Ibid.*

7. Where there has been a trial without an issue, in the Court below, the defect must be brought to the attention of that Court, before it can be noticed in the Supreme Court.—*Knowlton et al. v. Murdock*, 487

ESTOPPEL.

See PLEADING, 26. JURISDICTION, 15, 16.

Of Principal to deny Power of Agent. See PRINCIPAL AND AGENT, 2, 5.

Of Agent from questioning Power of Principal. See PRINCIPAL AND AGENT, 2, 3.

A promise to a body or organization of men, professing to act as a corporation, in an instance, or under circumstances, where by law a corporation of that character could not have a legal existence, does not estop the person making it from showing the facts.—*Gillespie v. The Fort Wayne and Southern Railroad Co.*, 243

EVIDENCE.

See SLANDER, 4, 5, 6, 7.

When not in Record. See PRACTICE, 15. EJECTMENT, 1, 2.

Of Good Character. See SLANDER, 4. DIVORCE, 1, 2.

Fraud must be Proven. See PRESUMPTION, 3.

Of Former Conviction. See INDICTMENT, 2.

Of Foreign Judgment. See TRANSCRIPT, 5, 6, 7.

Of Meaning of Technical Terms. See CONTRACT, 33.

Of Custom and Usage. See CONTRACT, 39.

Of Right to Vote. See ELECTION, 1, 3, 4.

Of Warranty of Soundness. See PRACTICE, 49, 52.

1. When the evidence is not in the record, the instructions given by the Court below will be presumed to be correct, if in any supposable state of facts, they would rightly expound the law; and instructions refused will be presumed to have been refused because not applicable to the evidence.—*Branham et al. v. Bradford*, 47

2. Suit by A. against B., C., and D., to recover damages for backing water upon the lands of the plaintiff. On the trial,

the defendants offered and gave in evidence, over the plaintiff's objection, the record of a proceeding upon a writ of *ad quod damnum*, in the same Court, upon the petition of the grantors of the defendants. The petition for the writ did not name any of the proprietors whose lands it was supposed would be affected by the dam. The inquest of the jury set out that they had examined the land about the site of the proposed dam, and named several persons whose land might be affected, but did not name the grantors of the plaintiff, nor did it describe any land which would probably be affected. Notice was given only to the persons named in the inquest, and they not appearing, the inquest was confirmed, and leave given to erect the dam. The Court instructed the jury, that only the owners who would probably be injured need be named in the inquest, and the plaintiff's grantors not being named, the inference was, that in the estimation of the jury, they would not be injured by the erection of the dam, and that the record of the *ad quod damnum* was properly in evidence to show that the defendants had a right to build such a dam; but that if A., or his grantors, had no notice of the proceedings, then the plaintiff's claim would not be barred; but persons not named are barred, if they in any manner had sufficient notice of the proceedings to know what was going on; and whether the notice be written or verbal makes no difference. *Held*, that the record was improperly admitted in evidence, and that the instruction of the Court was erroneous; that the person applying for leave to build a dam, acquires the right to do so, only as against those whose lands the jury find will probably be affected, and who are notified, as provided by the statute.—*Lane v. Miller et al.*, 58

3. That the doctrine of *lis pendens* had no application to the case; as, though the parties who then owned the land might actually have known of the pendency of the proceeding, yet they had a right to presume that, if the jury supposed their lands would be injuriously affected, they would be notified and made parties. *Ibid.*

4. That where an error is committed, in the admission of incompetent testimony, and the giving of an erroneous charge based upon it, there is no necessity that the

record should contain all the evidence given in the cause, or that the case should be specially stated in accordance with § 347 of the code, in order to have the error reviewed in the Supreme Court.

Ibid.

5. A subsequent verbal agreement, changing a previous written agreement, may be valid, and may be proved by parol, in a case where the original contract might have been made by parol. — *Rigsbee v. Boulter*, 167
6. On the trial of a prosecution for bastardy, it appeared that the child was born on September 18, 1858. The defendant offered to prove that in the first week in November, 1857, the relator had had sexual intercourse with another man. *Held*, that the testimony was rightly rejected. — *Duck v. The State, ex rel. Dill*, 210
7. The Court does not, ordinarily, attempt to control a party as to the order in which he shall introduce his evidence. — *Fowler et al. v. Hawkins*, 211
8. A sheriff's deed may be given in evidence before the judgment and execution upon which the sale was made are introduced, and if, on the trial, the production of the judgment and execution are waived, it would not be error for the Court to refuse to instruct the jury that the case was not made out for want of such evidence. — *Catterlin v. Douglass*, 213
9. Suit by *A.* against *B.* and *C.*, to recover the value of hogs alleged to have been wrongfully taken by them and converted to their use. *B.* answered, that the property described, at the time it was taken by him, was in the possession of *C.*, to whom the same had been sold and delivered by *A.*, and that *C.* sold and delivered the property to him. *C.* answered, that he had contracted with *A.* for the purchase of the hogs, which were to be delivered to him on the payment of the price, but that he never paid said price, and never had the possession of said hogs, nor any right to the possession thereof, and never directed or authorized any one to convert the same. On the trial, the plaintiff gave in evidence against *B.* the answer of his co-defendant *C.* *B.* gave in evidence a written contract signed by *C.*, as follows, viz., "I have this day bought of *A.*, 16,371 lbs. gross, of hogs,

amounting to \$590.48, to be paid for at the pens at *M.*" The Court instructed the jury that the contract, signed by *C.* alone, was not binding on *A.*, because not signed by him, and did not preclude him from showing by parol testimony that such writing did not embrace the entire contract. *Held*, that as *B.* claimed to derive title from *C.*, the declarations of the latter, by his answer, or otherwise, were not admissible to impeach the title of *B.*, since the declarations of a vendor, made after he has parted with his title, are not admissible to affect any one claiming under him. — *Keith v. Kerr et al.*, 284

10. The charge of the Court, so far as it assumed that the written contract was not binding upon *A.*, was incorrect, since he was a party to the instrument, notwithstanding he did not sign it. *Ibid.*
11. It is only where the written instrument appears on its face to be incomplete, and the proposed extrinsic testimony does not in any degree tend to contradict or vary the terms of the writing, that such extrinsic evidence is admissible to show the whole contract. *Ibid.*
12. The contract given in evidence was incomplete, in not showing where the hogs were to be delivered, and this might have been shown by parol testimony. *Ibid.*
13. Suit by *A.*, an ex-county treasurer, against *B.*, to recover the amount of certain taxes assessed against him, and which *A.*, when county treasurer, had charged up to himself, and for which he had accounted. Answer: the general denial. On the trial, the plaintiff was permitted to prove by parol that the lands upon which the taxes had accrued were assessed to *B.*, without producing the assessment roll or tax duplicate, or showing any excuse for their non-production. *Held*, that the testimony was erroneously admitted. — *Bright v. Markle*, 308
14. A want of consideration can not, under the code, be given in evidence under the general denial, as it formerly could under the general issue. — *Bingham v. Kimball*, 396
15. Under the code, want of consideration for a written instrument, of the class which *prima facie* imports a consideration, as the indorsement of a note, must be specially pleaded; and evidence of a

- want of consideration can not be given, in such case, under the general denial.—*Frybarger v. Cockefair*, 404
16. A transcript of a judgment containing no *placita*, showing the style and term of the Court in which, and the place where, the judgment was rendered, will not support an action.—*Phelps v. Tilton*, 423
17. The certificate of the judge, required by § 286, 2 R. S., p. 93, to be attached to the transcript of a foreign judgment, to authorize the admission of such transcript in evidence, must show that the person so certifying was judge of the Court in which the judgment was rendered. *Ibid.*
18. The declarations of the debtor, made after the execution of an assignment for the benefit of the creditors, can not be given in evidence against the assignee, to defeat his right to the property.—*Wynne et al. v. Glidewell et al.*, 446
19. In suits to set aside the transfer or assignment of property, on the ground of fraud, the question of fraudulent intent is one of fact, and not of law, and the jury are the exclusive judges of the entire question; not only of the effect and weight of the circumstances adduced to prove such intent, but also whether the facts proved really amount to circumstances conducing to show it; and hence an instruction from the Court that certain circumstances tend to prove a fraudulent intent, is erroneous. *Ibid.*
20. In an action for *crim. con.*, it is not competent for the defendant to prove facts going to show that there was no affection existing between the plaintiff and his wife, at and before the time of the alleged seduction.—*Dallas v. Sellers*, 479
21. The statute seems to contemplate that the record of the Court of Conciliation shall only affect the question of costs, and hence it may be given in evidence to the Court, instead of the jury, to enable it to determine which party shall be taxed with the costs.—*Strange v. Prince*, 524
22. Where the statement of the judge of a court of conciliation, as to the identity of the record of his court, was received in the Court below without putting him under oath as a witness, it must be presumed that the parties waived the administration of the oath. *Ibid.*
23. Where the record of a court of conciliation recites that the parties appeared, the notice need not be set out. *Ibid.*
24. A statement made voluntarily by a witness, and received over the objections, if properly presented, of the party who introduced the witness, in reference to matters which the opposite party could not, and the party introducing him did not, call out, should not be considered as legitimate evidence merely because it was given on the principal examination.—*Allison, President of the Bank of Gosport v. Hubbell*, 559
25. Parol testimony is not admissible to vary the terms of a written contract, by proof of a verbal contract about the same subject matter, made at or before the time of making the written contract.—*Oiler et al. v. Bodkey et al.*, 600
26. An erroneous admission of testimony on the trial is not brought in review by a general assignment in the motion for a new trial of "errors of law occurring at the trial," &c., but where excessive damages is also assigned as a cause, the Supreme Court will look into the question of the illegality of the testimony in determining the question of excessive damages. *Ibid.*
27. *A.* being the owner of certain lands, gave a written power of attorney to *B.*, authorizing him to sell, assign, transfer, trade and dispose of said lands, either for cash or in exchange for other property. He was to continue to act as such attorney for eighteen months, and to receive for his services one half of all he might make out of said property over a certain price, and where other property was taken in exchange, the compensation was to be determined by getting other persons to estimate the value of the property so taken. *B.* having by an exchange procured a certain mill property, rented the same to *C.*, who was dispossessed by a lessee of *A.*, on the ground that *B.* had no authority to rent said lands. Suit by *C.* to recover possession. *Held*, that as the evidence as to the authority of *B.* to rent the premises was conflicting, it was competent for *C.* to prove that *B.* had acted as the agent of *A.* in renting other lands taken by him in exchange under his power of attorney.—*Hitchens v. Rickets et al.*, 625

28. Under the letter of attorney, B. had such a power, coupled with an interest, as gave him authority to rent, at least until such time as he and his principal should close their accounts. *Ibid.*

EXCEPTIONS.

See BILL OF EXCEPTIONS, 1, 2, 3, 4.

To Instructions must be signed by Judge. See INSTRUCTIONS, 14.

EXECUTION.

Land must be offered in Parcels. See SHERIFF'S SALES, 2.

Against Partners may be Levied on Property of one. See PARTNERS, 2, 4.

1. If a judgment be satisfied, the power to sell under it ceases; and should a sale take place in virtue of an execution upon such satisfied judgment, even a *bona fide* purchaser without notice would acquire no title.—*Laval et al. v. Rowley*, 36
2. Where a judgment is joint against two defendants, both are regarded as principals, unless by proof, *aliunde*, one of them is shown to be surety for the other; and when one of such defendants, claiming to be surety for the other, pays off the judgment, without any judicial determination of the question of his suretyship, he can not have execution for his use on the judgment. *Ibid.*
3. In the absence of any statutory provision, directing or authorizing it, the clerk has no authority to issue an execution upon a judgment, without being directed so to do by the judgment plaintiff, or his attorney.—*Lewis et al. v. Phillips*, 108
4. The property in a judgment, is in the judgment plaintiff, and he alone, or those acting for him, have the right to order an execution, or to delay it. *Ibid.*
5. *Quære*: Whether § 428, 2 R. S. 1852. p. 176, which provides that at the expiration of the stay, it shall be the duty of the clerk to issue a joint execution against the property of all the judgment debtors, and the replevin bail, should not be construed to be directory as to the manner of the execution, rather than a direction to issue upon the expiration of the stay. *Ibid.*
6. Perhaps an execution defendant could not complain, where a clerk issues an execution without authority from the plaintiff, if the plaintiff afterward acquiesces in, and ratifies the act; nor could the plaintiff, in such case, object that the clerk had no authority to issue the execution. *Ibid.*
7. Where a deputy clerk issues an execution, without authority from the judgment plaintiff, and without any direction from his principal so to do, and afterward becomes a purchaser at a sale on the execution, he can take no benefit from his purchase, although no actual fraud entered into the transaction. *Ibid.*
8. Where a debtor has claimed the benefit of the exemption law, and three hundred dollars' worth of property has been set off to him, it may afterward be sold by him, discharged from the lien of the execution.—*Godman v. Smith*, 152
9. Where a debtor has not three hundred dollars' worth of property, upon which an execution might attach, it being all personal property, it does not become subject to the lien of the execution. *Ibid.*
10. No formal levy of a certified copy of a judgment of sale in a foreclosure suit is necessary, because the judgment itself designates the particular property to be sold.—*Ewing v. Hatfield et al.*, 513
11. An offer to sell would be a commencement of the execution of the judgment, and where execution has been commenced before, it may be completed after, the return day. *Ibid.*
12. The issuing of a subsequent void writ, while the original valid one is still in the hands of the officer, would not vitiate action under the original. *Ibid.*

EXECUTORS AND ADMINISTRATORS.

1. An executor derives his power to act as such, in reference to the transfer of immovable property, from a compliance with the law of the place where he attempts to operate under the will, and not from the will alone.—*Lucas v. Tucker*, 41
2. Where local laws exist, in regard to executors appointed in another State, the same must be at least substantially

complied with, before the executor can there be recognized as such. *Ibid.*

3. The curative statutes enacted by our Legislature to heal certain defects in sales made by executors, only embrace the proceedings of such persons as have acted, or attempted to act, under the laws of this State, either by original appointment under the same, or by conforming thereto, if appointed without the State. And, hence, can have no application to a case where executors, appointed and qualified in another State, proceed to sell lands in this State, under a power contained in the will, without attempting to conform to the laws of this State on the subject of foreign wills. *Ibid.*
4. A set-off may be pleaded to an action by an administrator.—*Schoonover, Administrator of Strain v. Quick*, 196
5. An administrator *de bonis non* filed with the clerk of the proper Court, in vacation, his petition for the sale of real estate of the deceased. Notice to the heirs was issued by the clerk, and at the next term of the Court a sale was ordered, in accordance with the petition. The land was sold, the purchase money paid, and a deed executed to the purchaser by order of Court. Proceedings by the heirs of the intestate to review the order directing a conveyance to be made. *Held*, that under the R. S. 1843, the petition of the administrator was properly filed in vacation, and that the clerk had authority to issue notice to the heirs without any special order of the Court.—*Shepherd et al. v. Fisher et al.*, 229
6. The heirs of the intestate stand in the same position as if the sale had been made by them, and can not set aside the sale on the ground of fraud, or of a trust, without having first restored the purchase money. *Ibid.*
7. A person entitled to rescind a contract on the ground of fraud, must restore to the other party what has been received, so as to place him in *statu quo*. *Ibid.*

EXEMPTION.

1. Suit by an assignee of a promissory note, against his assignor, averring the insolvency of the maker. It appeared in evidence, that the maker of the note was a

householder of the county, and that his property was worth only two hundred dollars. *Held*, that property within the exemption of three hundred dollars should, *prima facie*, be considered as beyond the reach of the law.—*Campbell v. Gould et al.*, 133

2. Where a debtor has claimed the benefit of the exemption law, and three hundred dollars' worth of property has been set off to him, it may afterward be sold by him, discharged from the lien of the execution.—*Godman v. Smith*, 152
3. Where a debtor has not three hundred dollars' worth of property, upon which an execution might attach, it being all personal property, it does not become subject to the lien of the execution. *Ibid.*

FEES.

Of County Recorder. See RECORDER, 1, 2

The District Attorney for Warren county filed his claim before the Board of Commissioners for docket fees, alleged to be due him for prosecuting certain criminal cases, in which the defendants had been acquitted. *Held*, that the statutes of this State give no authority to charge the county with the fees in question, and, in the absence of such authority, the county is not chargeable with their payment.—*Nourse v. The Board of Commissioners of Warren County*, 355

FIXTURES.

Fixtures used in, and attached to, a building used for manufacturing purposes, will pass by a mortgage of the freehold.—*Millikin et al. v. Armstrong et al.*, 456

FORCIBLE ENTRY AND DETAINER.

The summary remedy furnished by § 12, 2 R. S. 1852, p. 492, for recovering the possession of land, before justices of the peace, was only intended to be given in cases where there has been an unlawful and forcible entry, or where the entry has been peaceable, but the detention is unlawful and forcible. The word "or," in the first line of the section, being evidently used in the sense of "and."—*O'Connell v. Gillispie*, 459

FORECLOSURE.

See MORTGAGE, 3, 4, 5, 7, 8, 9, 10, 11, 13, 14, 15.

Levy not Necessary under. See EXECUTION, 10, 11.

1. Where the mortgagor has sold his equity of redemption in the mortgaged premises, he is not a necessary party to a bill for foreclosure, but the order of sale, in such case, should be limited to the mortgaged premises, and no personal judgment taken against the holder of the equity of redemption.—*Burkham v. Beaver*, 367
2. The recovery of a general judgment upon the notes secured by a mortgage is no bar to an action of foreclosure upon the mortgage.—*Jenkinson v. Living*, 505

FORGERY.

See INDICTMENT, 3, 4, 5.

FORMER ACQUITTAL.

1. Where, in a prosecution for bastardy, the defendant is discharged, &c., on account of the failure of the relator to appear, the judgment, not being upon the merits, is not a bar to a further prosecution.—*The State, ex rel. Sumter v. Barbour*, 526
2. The failure of the justice to enter of record a finding that the defendant was the father of the child is of no consequence, where the defendant is recognized.—*Ibid.*

FORMER CONVICTION.

See INDICTMENT, 2.

FORMER RECOVERY.

If the jury find for the plaintiff, upon one paragraph of his complaint, and do not, in terms, find upon the other paragraph, the plaintiff, having introduced evidence in support of the latter, and taken judgment on the verdict, will have as effectually precluded himself from bringing another suit for the same matter, as if there had been an express finding against him on the other paragraph.—*Shaw et al., Administrators of Slocum v. Barnhart*, 183

FRAUD.

See MORTGAGE, 8. HUSBAND AND WIFE, 1, 2. STOCK, SUBSCRIPTION OF, 3, 4. GARNISHEE, 1. STATUTE OF FRAUDS, 1, 2.

Assignment to Defraud Creditors. See ASSIGNMENT, 2, 3, 4.

Not Presumed. See PRESUMPTION, 3.

1. Suit to recover the possession of personal property. Answer: 1. General denial. 2. Right of possession in the defendant, by virtue of a chattel mortgage from the plaintiff, but without setting out a copy of the mortgage. Reply: 1. That the plaintiff was, at the time of executing the mortgage, of weak and imbecile mind, and so far insane as to be incapable of understanding the nature of the same, and was unable and unfit to do business, and incapable of assenting to any contract. 2. That said mortgage was procured by fraud, in this, that the defendant fraudulently and falsely represented to the plaintiff, that said mortgage was a promissory note, and he being entirely uneducated, and incapable of judging of the effect of a mortgage, and relying upon said false and fraudulent representations, executed said mortgage, &c. *Held*, that the first reply was good.—*Louchheim v. Gill*, 139
2. The second reply did not show such a misrepresentation of facts as would vitiate the mortgage. *Ibid.*
3. If a conveyance be made colorably, with actual intent to defraud existing creditors, it may be avoided by subsequent creditors; in other words, evidence of collusion against existing creditors, is sufficient evidence of fraud against subsequent creditors.—*Dart et al. v. Stewart et al.*, 221
4. Suit by A., against B., C. and D., to recover damages for false and fraudulent representations in the sale of a newspaper establishment. The complaint averred that the defendants being the owners and publishers of a certain daily and weekly newspaper, and the owners of the printing presses, type, &c., used in publishing the same, offered to sell to the plaintiff the right to publish said paper, together with the good will, patronage, and subscription list of said establishment, as well

as the fixtures and property of every kind belonging to said office; and to induce him to buy the same, defendants did then and there falsely and fraudulently represent to plaintiff that the number of paying subscribers to the daily paper exceeded three hundred, and that the number of paying subscribers to the weekly paper was at least one thousand; when, in truth and in fact, the number of paying subscribers to said daily paper did not exceed one hundred and thirty-seven, and the number of paying subscribers to said weekly paper did not exceed six hundred. That defendants further falsely and fraudulently represented that the subscription list and advertising patronage of the daily paper paid the entire expense of the establishment, leaving the subscription list and advertising patronage of the weekly paper clear profit; all of which statements were false, and known to be so by the defendants at the time, &c.; that the plaintiff relying upon said representations, purchased said paper, &c. After verdict for the plaintiff, the Court ordered the damages found by the jury to be taken and treated as a credit upon the notes given by the plaintiff for the paper, and remaining unpaid, and that the notes to that amount should be surrendered. *Held*, that the number of subscribers to the paper, and the amount of the business and profits of the establishment were material considerations inducing the purchase.—*Harvey et al. v. Smith*, 272

5. The representations were such as the buyer had a right to rely upon, the matters concerning which they were made being peculiarly within the knowledge of the seller. *Ibid*.

6. There was no error in the order made by the Court directing the judgment to be credited on the outstanding notes. *Ibid*.

FRAUDS, STATUTE OF.

See STATUTE OF FRAUDS, 1, 2.

1. Suit for work and labor. Answer: that the work was done under a parol contract that the plaintiff would receive in payment, one of two designated town lots, which, on the completion of the work and the selection of the lot by the plaintiff, the defendant was to convey to him; that the defendant had always been ready and

willing, &c., but that the plaintiff had failed to signify which lot he would take. *Held*, that the contract was not within the statute of frauds.—*Lingle v. Clemens et al.*, 124

2. A parol contract for the sale of land is voidable, not void; and payment of the consideration may be such part performance as to take such a contract out of the statute of frauds. *Ibid*.

GARNISHEE.

See PLEADING, 31.

Where a person summoned as a garnishee answers that he was indebted to the attachment defendant, but that before the service of the writ of garnishment, he was notified of the assignment of the note constituting such indebtedness, if the plaintiff desires to dispute such assignment for want of consideration or for fraud, it is proper, if not necessary, to bring the person claiming to hold as assignee, before the Court, so that he may be bound by the judgment; and on the trial of an issue thus formed, the attachment defendant would be a competent witness. *Quære*: Whether the question of a fraudulent transfer can, if objected to, be tried in the garnishment proceeding.—*Cadwalader et al. v. Hartley et al.*, 520

GIFT.

The delivery of a chattel is necessary to pass the title by gift, but the delivery must be according to the nature of the thing given; and if the property is at the time of the gift in the possession of the donee, as agent for the donor, it is not necessary that the donee should surrender to the donor his actual possession, in order that the latter may re-deliver the same to him in execution of the gift; but if the donor relinquishes all dominion over the thing given, and recognizes the possession of the donee as being in his own right, and the latter accepts the gift, and retains possession in virtue thereof, the gift is complete.—*Tenbrook v. Brown*, 410

GUARDIAN AND WARD.

1. Suit by a widow for partition of the lands of which her husband died seized, and which by his will he attempted to

dispose of to his minor children, who were made defendants. A guardian *ad litem* was appointed for all the minor defendants but one, who had not been served with process, but whose testamentary guardian had been served. Answer by the guardian *ad litem*, that the plaintiff was not entitled to any share of said lands, because of an ante-nuptial agreement, and of the execution of said will, by the husband, disposing of said land. The agreement pleaded provided that the husband was to have the right to dispose of his lands, by will or otherwise, as he might please, provided that if he died first his wife was to be provided with a home and a support on the home farm during her life, and also to have what might remain of any property she might bring to him, she taking care of his children while they were willing to stay with her. Another clause provided that the wife should take care of said children, or cause them to be taken care of and provided for, if the husband should die before they are able to take care of themselves, and that she should also pay the taxes and keep up the farm, &c. The will of the husband devised the land to his minor children. A demurrer having been sustained to this answer judgment was rendered for the plaintiff, without proof, for want of an answer. *Held*, that it was erroneous to render judgment for want of an answer, without proof, and that the Court might have compelled the guardian to put in an answer, or in default thereof have removed him.—*Richards et al. v. Richards*, 636

2. The provisions of the ante-nuptial contract were intended to, and did, exclude the wife from claiming that interest in the lands, which she would otherwise have been entitled to under the law. *Ibid.*
3. The service of process upon the testamentary guardian was sufficient, under the statute regulating partition suits, to bring his ward before the Court. *Ibid.*

HIGHWAY.

1. Petition to the county board for the location of a county road, the route of which was described as follows, viz., "commencing at the State road leading from Washington, Daviess county, and Bedford, Lawrence county, Indiana, at sections six-

teen and seventeen, and running on the line between Barr and Washington townships, due south, or as nearly so as it can run to get a good road, to intersect the Alfordsville road." After viewers had been appointed, and had reported in favor of the road, a remonstrance was filed, claiming damages. Viewers having reported against the claim for damages, the remonstrants appealed to the Circuit Court, and there moved to dismiss the proceedings for want of a sufficient petition. *Held*, that if the petition was so insufficient as to form no basis for the action of the board, an objection thereto would be fatal at any stage of the proceedings.—*Hays et al. v. Campbell et al.*, 430

2. A petition for the location of a highway passing through but one county must, under our statute, set out the names of the owners, or occupants, or agents, of the lands through which the proposed highway would pass; and in the absence of such requisite in the petition, the board is not authorized to act upon the same. *Ibid.*

HUSBAND AND WIFE.

See MARRIED WOMAN, 1. CONTRACT, 6, 8, 10.

Properly Joined as Parties. See PLEADING, 8.

Tort to Wife. See ACTION, 3.

Ante-Nuptial Contract. See PRACTICE, 55, 56.

1. Suit against A. and B., and their wives, to set aside a conveyance of real estate, made by C. to the wives of the said A. and B. The complaint alleged that the said A. and B. being partners, were indebted to the plaintiffs in a large sum, upon which a judgment had been recovered against them; that after the making of said debt, and before the recovery of the plaintiff's judgment, the said A. and B. had sold a large stock of merchandise owned by them to C., and had received in part payment a conveyance of certain real estate; that after the conveyance by C. to them, they had, for the purpose of defrauding their creditors, delivered up said deed to C., and procured him to execute a deed to their wives. Answer, by A. and wife, denying all fraud, and all knowledge of the execution of any deed

by *C.* to *A.* and *B.*, and averring that the said *A.* had received from the estate of his wife \$900, which he had several times invested in her name and for her benefit; and the same coming again into his hands, he invested the same in goods for the firm of *A.* and *B.*, where the same remained, as the separate money of his wife, until the sale of said goods to *C.*; that the conveyance of *C.* to her was in consideration of said debt, and to discharge the same, and was so accepted. *B.* and wife answered, denying all fraud, and also all knowledge of any conveyance by *C.* to *A.* and *B.*, and averring that the father-in-law of the said *B.* had advanced to him and his wife \$1,500, for which he held their joint note, and that at the time of the sale of the goods to *C.*, it was agreed between him and his said father-in-law, that the latter should receive one half of the land to be conveyed by *C.*, in discharge of said debt, and that said land was, by the direction of his said father-in-law, conveyed to his daughter, the wife of *B.*, as an advancement, in pursuance of said agreement. *Held*, that the answer of *A.* and wife sufficiently excluded the idea that the money received by *A.* from his wife became his by virtue of his marital rights, and that this indebtedness to the wife constituted a good consideration for the conveyance.—*Schaffer et al. v. Fithian et al.*, 463

2. The answer of *B.* and wife showed a sufficient consideration for the interest conveyed to her, and the transaction, in the absence of fraud, was valid. *Ibid.*
3. If a deed was once executed and delivered by *C.* to *A.* and *B.*, the surrender of the deed to the former would not revest the title in *C.*; but as the complaint did not aver that such deed had ever been recorded, and as the answers of the wives denied any knowledge of its ever having been made, they must be regarded as innocent purchasers without notice. *Ibid.*
4. Under 1 R. S. 1852, § 16, p. 234, it is wholly immaterial whether the subsequent conveyance was made before or after the expiration of the ninety days limited for the recording of the first; and as the prior purchaser, it is immaterial whether the subsequent conveyance is ever recorded. *Ibid.*

IMPEACHMENT OF WITNESS.

Before a witness can be impeached by proof of contradictory statements made out of Court, he must be inquired of as to such statements, after having his memory refreshed as to time, place and person.—*Owen et al. v. Rymeron*, 620

INDICTMENT.

1. Prosecution for an assault and battery with an intent to commit murder. The indictment charged "that *A.*, on, &c., at, &c., did then and there unlawfully and feloniously, in a rude, insolent and angry manner, touch and strike one *B.*, with intent then and there unlawfully and feloniously, and with premeditated malice, to kill and murder the said *B.*, by shooting him in the back with a gun loaded with powder and shot, which gun the said *A.* then held in his hands," &c. *Held*, that the words "with intent," &c., as used in the indictment, sufficiently expressed the meaning of the word "purposely," as used in the statutory definition of murder; and that the word "feloniously," in the connection in which it was used in the indictment, was identical in its import with the word "purposely."—*Carder v. The State*, 307
2. In a prosecution for forgery, the indictment alleged that on, " &c., at, &c., the defendant did unlawfully, &c., give, barter, sell, utter, publish, and put away, to one *B.*, sixteen false, forged and counterfeit bank notes, the genuine of which bank notes were current at the time, in the State of *Indiana*, and which purported to be genuine, and were for, &c., each, and issued by the *Winstead Bank of Connecticut*, payable to "*E. Seymour*, or bearer." Copies of the notes were set forth in the indictment. On the trial, the defendant offered to prove that at the *October* term, 1860, of said Court, in a case of the State against him, on an indictment for forgery, then on trial, the witnesses gave testimony in reference to the same bank notes, and the same transaction mentioned in the indictment upon which defendant was then being tried. The Court having refused to allow the testimony to be given, the defendant then offered in evidence the record of a conviction, for the purpose of showing that he had been once tried and convicted for the

same offense. The record offered, showed that a person of the same name had been tried and convicted on an indictment for a forgery in all respects similar to the one now charged, except that the notes in the former case were charged to have been payable to *E. lymour or bearer.*" *Held*, that the record of the alleged former conviction, viewed as an isolated item of evidence, was properly rejected; as the counterfeit notes described in the former case did not correspond with those described in the pending indictment; but that viewed in connection with the parol evidence offered to show the offenses to have been, in fact, identical, the record was competent, and should have been admitted, even though the two items of evidence were offered separately, and not technically in order.—*Porter v. The State*, 415

3. It was not necessary to the full description of the offense charged, to allege that the genuine notes were current, and that such an averment was mere surplusage. *Ibid.*

4. It is not necessary, where the trial is upon the original indictment, that the record should show that it had been recorded, compared with the original, and certified by the judge. *Ibid.*

5. An order that the defendant should stand committed until the fine and costs were paid or replevied was erroneous, so far as the order related to the costs. *Ibid.*

6. The record of the trial of a criminal charge upon indictment must show, on appeal, by a caption to the indictment, or other proper entry, that a grand jury was impaneled at the term at which the indictment was found, and that the grand jury returned the indictment into Court.—*Sawyer v. The State*, 435

7. An indictment or information, under § 11 of the act of March 5, 1859, (Acts 1859, p. 202,) for selling or giving away liquor to a minor, need not state the kind of liquor sold or given away, but must aver it to have been an "intoxicating liquor;" and on the trial it must appear that the liquor was within the definition of the terms, "intoxicating liquor," given in § 2 of the act.—*Simpson v. The State*, 444

8. An indictment for selling liquor in a less quantity than a quart must specify the

quantity sold; and this is not done with sufficient accuracy, where the quantity is charged to have been "two glasses."—*Haver v. The State*, 455

INFANCY.

1. Suit to recover for work and labor done by the plaintiff during his minority. Answer: 1. Payment, after the plaintiff attained his majority. 2. Set-off, for goods sold, the same being necessaries. 3. That the father of plaintiff, during his minority, had hired him to the deceased for six years, or until he should attain his majority, the deceased agreeing to give him certain articles of personal property at the expiration of the term; that after the plaintiff attained his majority, he and his father had a settlement with the deceased of all matters between them, and the plaintiff received \$175, in full payment of the demand sued for. *Held*, that the third answer was substantially good.—*Hobbs v. Godlove et al., Executors of Godlove*, 359

2. The plaintiff could not reply infancy to the first and second answers, as if the plaintiff was paid in full, though an infant at the time, he could not sue for and recover payment again; and the set-off, if for necessaries, as alleged, was not avoided by replying infancy. *Ibid.*

INFORMATION.

For Refusing Vote. See ELECTION, 1, 2, 3, 4.

1. The Court of Common Pleas has jurisdiction in felonies, only in certain specified cases, and the information must show, on its face, such a state of facts as entitles the Court to entertain such jurisdiction.—*Justice v. The State*, 56

2. The information must show that the felony, on charge of which the defendant is alleged to be in custody, is the same felony for which the information is filed. *Ibid.*

3. Where a party is charged with a felony, in a Court not having jurisdiction over the subject matter, the defect of jurisdiction can be taken advantage of on motion to quash, or, in arrest of judgment, or, on appeal. *Ibid.*

4. Information charging that the defendant failed and refused to take and subscribe an oath attached to a certain tax list, known as "Statement No. 1," when the same was presented to him by the assessor on, &c. *Held*, that no offense was charged in the information, the character of the affidavit which the defendant refused to sign not being shown with sufficient certainty. — *Buckingham v. The State*, 305

5. Information against three persons, described as the "Trustees of the Wabash and Erie Canal," for a nuisance, in failing to keep a bridge in such repair as to be safe for public travel. *Held*, that the information against the "trustees" was bad, for not showing that the road named, or the bridge, crossed the canal; the averment in the information that it was their duty to keep it in repair being a mere conclusion of law. — *Butler et al. v. The State*, 450

6. The information against the defendants, as private individuals, was bad, for not showing by what right they became possessed of the bridge, and how it became their duty to keep it in repair. *Ibid.*

7. An information for a felony, in the Court of Common Pleas, must show that the defendant is in custody on a charge of the felony for which the information is filed, and must negative the finding of an indictment against him. — *Kreigh v. The State*, 495

INJUNCTION.

See CONTRACT, 11.

To Restrain Issuance of Commission. See ELECTION, 5, 7.

Suit to restrain the collection of a judgment rendered upon certain bonds filed with the county auditor, under the provisions of the act of March 4, 1853, to regulate the sale of spirituous liquors, &c., (Acts 1853, p. 87.) The complaint alleged that the act under which the bonds were filed was unconstitutional and void, and that the judgment, for that reason, was a nullity. *Held*, that the act being unconstitutional and void, the bonds were not supported by a legal consideration; but the judgment rendered thereon, though erroneous, was not void, but must be regarded as operative until reversed by a court of error. — *Cassel v. Scott et al.*, 514

INJURY.

To Person. See NEGLIGENCE, 1, 2, 3, 4, 5.

To Animals. See RAILROAD, 2, 3.

To Wife. See ACTION 3.

To Child. See ACTION, 4

INSTRUCTIONS.

See REFLEVIN, 5. JURISDICTION, 16, 17.

1. A rule of Court requiring a party desiring written instructions, only, to be given to the jury, to notify the Court of such desire before the trial commences, is repugnant to the laws of this State. — *Laselle v. Wells*, 33

2. Where the Court has had timely notice of the desire of one of the parties that written instructions, only, shall be given to the jury, it is error for the Court to accompany such written instructions with verbal explanations, and illustrate them by reading from books; and such error was not, in this case, cured by a direction from the Court to the jury, to consider the verbal explanations and illustrations withdrawn. *Ibid.*

3. A bill of exceptions purporting to set out the evidence, must contain the words, "this was all the evidence given in the cause." The words, "this was all the evidence given on said trial" are not sufficient. — *Branham et al. v. Bradford*, 47

4. When the evidence is not in the record, the instructions given by the Court below will be presumed to be correct, if in any supposable state of facts, they would rightly expound the law; and instructions refused will be presumed to have been refused because not applicable to the evidence. *Ibid.*

5. A sheriff's deed may be given in evidence before the judgment and execution upon which the sale was made are introduced, and if, on the trial, the production of the judgment and execution are waived, it would not be error for the Court to refuse to instruct the jury that the case was not made out for want of such evidence. — *Catterlin v. Douglass*, 213

6. Where a Court refuses instructions, and the evidence is not in the record, the Supreme Court will, as a general rule, presume the ruling to be correct. *Ibid.*

7. After the Court has commenced to instruct a jury orally, it is too late for a party to require the instructions to be given in writing.—*Boggs v. Clifton*, 217
 8. Where the evidence is not in the record, the Supreme Court will presume in favor of the instructions of the Court below, if in a supposable state of facts, they would be correct. *Ibid.*
 9. Suit to recover for deceit in the sale of a yoke of cattle. The complaint averred, that "the defendant well knowing the premises, and intending to cheat and defraud the plaintiff, falsely and fraudulently represented to him, that the cattle were gentle," &c. The Court instructed the jury, that if they found the defendant had been guilty of a fraud upon the plaintiff, they might assess exemplary, or smart damages, in addition to compensatory, or actual damages. *Held*, that the instruction was correct; the rule being, that where the offense is not punished by the criminal law of the land, and where the elements of fraud, malice, gross negligence, or oppression, mingle in the controversy, the jury might give vindictive or exemplary damages.—*Millison v. Hoch*, 227
 10. Suit to recover the value of a certain promissory note, converted by the defendant to his own use. The Court instructed the jury that if the maker of the note was insolvent, so that he had no property subject to execution, his note was of no value, and the defendant was not liable for its conversion. *Held*, that the instruction was erroneous, as other elements than mere amount of property subject to execution, enter into a man's credit, and value of his paper.—*Pratt v. Boyd*, 282
 11. The Supreme Court will presume in favor of the instructions of the Court below, where the evidence is not in the record, if in a supposable state of facts under the issues, they would have been correct.—*Griffin v. Templeton*, 234
 12. Suit by a distributee of a testator, against the son and executor of the testator, to obtain distribution of certain personal property claimed by the son by gift from the father, in his lifetime. The plaintiff asked the Court to instruct the jury, that the son as agent of his father, before the time the gift is claimed to have been made, and no apparent change of ownership took place, there was no valid gift; which the Court modified, by striking out the words, "there is no valid gift," and inserting the words, "it is evidence tending to prove that there was no valid gift." *Held*, that the instruction, as asked, was properly refused, and that as given, it was as favorable to the plaintiff as he could legally ask.—*Tenbrook v. Brown*, 410
 13. A party has the right, if properly asserted, of having all modifications and explanations of instructions reduced to writing. *Ibid.*
 14. Instructions given or refused by the Court below, to which the counsel of the party objecting has appended an exception, by writing thereon "given and excepted to," or "refused and excepted to," signed by counsel, can not be regarded as part of the record unless signed by the judge also.—*Cross v. Pearson*, 612
- ### JUDGE.
1. Where a cause is tried by a stranger, not by the legal and judicially recognized judge, the record must show the right of such stranger to act.—*Cooper v. Lingo*, 67
 2. It appears from the record, that one A., judicially known to the Supreme Court to have been the judge of the Court below, began the term of the Court at which this case was tried, and made rulings in the case. Afterward, and before the day of the trial, the record shows that the Court was held by one B., "acting judge of said Court," but contains no record of the manner or purpose of his appointment as such. A motion for a new trial having been overruled, thirty days were given to prepare a bill of exceptions, which was prepared within the time limited, and signed by B., as judge. *Held*, that in the absence of evidence, or judicial knowledge, of the right of B. to sign the bill of exceptions, as judge, such right can not be presumed to exist.—*The Board of Commissioners of Fountain County v. Coats*, 150
 3. It should appear from the record, or be within the judicial knowledge of the appellate Court, that the inferior tribunal before which a case was tried, had authority

to act in the premises, either legally, or in fact; and as it does not appear so in this case, the whole proceedings were without law, and can not be maintained.

Ibid.

4. No other judge than the one who tried the cause can correct a bill of exceptions.—*Halstead v. Brown*, 202
5. A Circuit judge having been of counsel in a cause pending in his Court, set the same for trial before a judge of the Supreme Court, who appeared at the time designated, being in regular term time, heard some arguments and made some orders therein as to making new parties, &c. The Supreme judge not having appeared further in said cause, the same was again set for trial by the judge of the Circuit Court, before a judge of another circuit. This was done by agreement of the parties, entered of record. The cause was accordingly heard before the judge last designated, who, after repeated adjournments, from time to time, and not within any regular term of said Court, decided the same, and rendered judgment for plaintiff, over a motion for a new trial by defendants. *Held*, that the judgment thus rendered was valid and binding; that said judge last designated had full power, under the act of *March 1, 1855*, (Acts 1855, p. 61,) to adjourn the hearing of said cause from time to time, although some of said adjournments might have been to a day beyond a regular term of said Court.—*Cincinnati, &c. Railroad Co. et al. v. Rowe et al.*, 568
6. An order of the Circuit Court continuing said cause to another term, while the same was pending before the judge designated to try the same, was without authority. *Ibid.*
2. Where a judgment is joint against two defendants, both are regarded as principals, unless by proof, *akunde*, one of them is shown to be surety for the other; and when one of such defendants, claiming to be surety for the other, pays off the judgment, without any judicial determination of the question of his suretyship, he can not have execution for his use on the judgment. *Ibid.*
3. A judgment directing the sale of real estate on a vendor's lien, in the first instance, unless the vendee has no personal property out of which the judgment might be made, is erroneous.—*Stevens v. Hurt et al.*, 141
4. On *April 2, 1849*, a judgment was recovered against *A.*, in a prosecution for bastardy, for \$265, which was directed by the Court to be paid in installments, running through a period of twelve years. *B.* became replevin bail upon the judgment, and afterward, in 1855, sold and conveyed to the plaintiff a tract of land owned by him in the county. On *May 14, 1860*, an execution was issued upon the judgment, and levied upon the land so sold by *B.* Suit to enjoin the sale. *Held*, that ten years having elapsed after the recovery of the judgment, and before the issuing of the execution, and the plaintiff not having been prevented from proceeding thereon, during any portion of such time, "by the operation of any appeal, or writ of error, or by the injunction of any judge or court," the lien of the judgment was discharged.—*Castle v. Fuller et al.*, 402
5. Suit to restrain the collection of a judgment rendered upon certain bonds filed with the county auditor, under the provisions of the act of *March 4, 1853*, to regulate the sale of spirituous liquors, &c., (Acts 1853, p. 87.) The complaint alleged that the act under which the bonds were filed was unconstitutional and void, and that the judgment, for that reason, was a nullity. *Held*, that the act being unconstitutional and void, the bonds were not supported by a legal consideration; but the judgment rendered thereon, though erroneous, was not void, but must be regarded as operative until reversed by a court of error.—*Cassel v. Scott et al.*, 514

JUDGMENT.

Affidavit to set aside Default. See DEFAULT, 1.

In Foreclosure, when Mortgagor not a Party. See FORECLOSURE, 1.

1. If a judgment be satisfied, the power to sell under it ceases; and should a sale take place in virtue of an execution upon such satisfied judgment, even a *bona fide* purchaser without notice would acquire no title.—*Laval et al. v. Rowley*, 36

JUDICIAL ACT.

Defined. See CONSTITUTIONAL LAW, 2, 3, 4.

JURISDICTION.

Of Persn. See TRANSCRIPT, 5.

In Violations of Liquor Law. See LIQUOR, 1.

1. As the Circuit Court is a court of general and unlimited jurisdiction, its authority to proceed in the trial of a cause need not affirmatively appear in the complaint; and hence in a petition for the partition of lands, it need not be averred that the land lies in the county where the suit is brought.—*Godfrey v. Godfrey et al.*, 6
2. The Court of Common Pleas has jurisdiction in felonies, only in certain specified cases, and the information must show, on its face, such a state of facts as entitles the Court to entertain such jurisdiction.—*Justice v. The State*, 56
3. The information must show that the felony, on charge of which the defendant is alleged to be in custody, is the same felony for which the information is filed. *Ibid.*
4. Where a party is charged with a felony, in a Court not having jurisdiction over the subject matter, the defect of the jurisdiction can be taken advantage of on motion to quash, or, in arrest of judgment, or, on appeal. *Ibid.*
5. Jurisdiction over the person of the defendant, may be conferred by pleading to the merits without raising the question; but no consent of parties can confer jurisdiction over the subject matter of a suit.—*The Indianapolis, &c. Railroad Co. v. Renner*, 135
6. Actions against railroad companies for injuries to animals, must, under the statute, be brought in the county where the injury was done, and in the absence of proof upon this subject, the jurisdiction of the Court over the subject matter of the case is not made to appear. *Ibid.*
7. It will be presumed in favor of the judgment of a court of general jurisdiction, the record not showing the contrary, that the land, in a foreclosure suit, was situated within the jurisdiction of the court.—*Culph et al. v. Phillips et al.*, 209
8. In a suit before a justice of the peace, the plaintiff claimed forty dollars, but recovered only seven dollars. The defendant appealed to the Court of Common Pleas, where the plaintiff had judgment for four dollars and fifty cents, from which the defendant appealed to the Supreme Court. *Held*, that the judgment below must be regarded as the "amount in controversy," on appeal, and that being less than ten dollars, the Supreme Court has no jurisdiction.—*Overton v. Overton*, 226
9. Suit commenced before a justice, after the act of 1861 (Acts 1861, p. 141) went into force. The damages claimed were two hundred dollars. On appeal to the Common Pleas, the cause was dismissed for want of jurisdiction in the justice. *Held*, that the dismissal was error, and that the justice had jurisdiction of the cause.—*Leathers v. Hogan et al.*, 242
10. Suit by an assignee of a promissory note, against the administrator of his assignor, averring the insolvency of the makers of the note. The plaintiff gave in evidence the note, and the assignment thereof, and also a transcript from the docket of a justice of the peace, by which it appeared that a suit had been instituted against the makers of the note, a judgment recovered, and an execution returned *nulla bona*. The transcript showed the cause of action to have been a note for \$100, upon which a small amount of interest had accrued at the commencement of the suit, though the justice gave judgment for \$100 only. *Held*, that the justice could not give himself jurisdiction by rendering judgment for a part only of the demand, and having no jurisdiction of the suit sought to be shown by the record, he had no authority to make a record which could be offered as evidence of diligence in prosecuting the note against the makers.—*Thompson, Administrator of Fale v. Kerr*, 288
11. Where a defendant appears and pleads in bar of the action, he can not afterward object to the jurisdiction of the Court over his person.—*Ringle v. Bickle*, 325
12. A. died intestate, in the year 1835, seized of certain real estate, leaving an only child, B., and his widow, surviving him. In the following year B. died intestate, leaving no issue, and without brothers and sisters, or their descendants, alive, but leaving uncles and aunts, who were

brothers and sisters of the half blood of her father. The father of *A.* was married twice, having by his first marriage two children, *C.* and *D.*, and by his second marriage one child, the said *A.*; he then died himself, and his widow married again and had two children, *E.* and *F.* The said *C.*, *D.*, *E.* and *F.*, the uncles and aunts of *B.*, of the half blood of her father, were living at the time of her decease. After the death of *B.*, her mother married again, and had issue. Suit by *E.* and *F.* against the vendees of *C.* and *D.* to recover one half of the land. On the trial, the defendants offered in evidence the record of a suit in chancery, brought by *C.* and *D.* against *E.* and *F.*, and others, to obtain distribution of the personal estate of *A.*, and also to obtain a decree that the complainants were entitled to the lands left by *B.*, to the exclusion of *E.* and *F.*, and for partition, &c. The bill was filed in the office of the clerk of the Circuit Court, in December, 1839, and notice thereof given by the petitioners by publication in a newspaper. The suit was called in the notice, after entitling the cause, "Bill of partition of real estate," and notified the defendants that the petitioners had filed their petition for partition, according to law, among those entitled, of the real estate of which *B.* died seized, &c. The notice was signed by the petitioners, and, together with an affidavit of its publication for four weeks, &c., was filed in Court, and the record recites that "it appearing to the satisfaction of the Court that said publication was made," &c., "thereupon, on motion, the defendants were defaulted," &c. It was therefore ordered and decreed that *C.* and *D.* were the heirs of *B.*, and that the title of said lands be vested in them. *Held*, that the bill in chancery, the record of which was offered in evidence, did not make such a case as was contemplated by the act of 1838, concerning the partition of lands (R. S. 1838, p. 426); that act contemplating cases where the rights of the defendants in the estate were not controverted, and the bill referred to making a case in which the rights of the defendants in the land were controverted and denied; and hence, the notice provided for in that act, which was the only notice given of the chancery suit, was not sufficient.—*Cox et al. v. Matthews et al.*, 367

13. The notice was not sufficient to give a court of chancery jurisdiction of the persons of the defendants, under R. S. 1838, p. 444, not being issued and signed by the clerk as an official act; that the defendants, had it come to their notice, might have treated it as a nullity, and hence, the Court did not acquire jurisdiction of the persons of the defendants. *Ibid.*

14. As the record offered sets out the notice, and the proof of its publication, and shows precisely on what the Court acted in assuming jurisdiction of the case, and as that notice was insufficient and void, so the decree rendered thereon was void, and the record thereof was properly rejected as evidence. *Ibid.*

15. The record was not admissible as constituting an estoppel *in pais*, as the vendees of *C.* and *D.* must be presumed to have known that the decree against *E.* and *F.* was void. *Ibid.*

16. The Court instructed the jury "that to constitute an equitable estoppel, it must be shown that the plaintiffs were apprized of each sale to innocent vendees before it was made, so that they might have had an opportunity to inform the purchaser of their interest in the property." *Ibid.*

17. The instruction was well enough, as its evident meaning was, that the plaintiffs must have been apprized of the intended sales. *Ibid.*

18. The possession of title deeds may be recovered in the action provided by the code for the recovery of personal chattels; and as the jurisdiction of justices of the peace, as to the character of the articles of property sought to be recovered, is equally extensive with that of the higher courts, title deeds may be recovered in an action of replevin in a justice's court.—*Wilson et al. v. Rybolt*, 391

19. The act of 1859 gives the Court of Common Pleas a jurisdiction unlimited as to amounts.—*Jenkinson v. Ewing*, 505

JURY.

Questions of Custom and Usage are for. See CONTRACT, 39.

Judges of Meaning of Words in Slander. See SLANDER, 5.

JUSTICE OF THE PEACE.

1. Suit commenced before a justice, after the act of 1861 (Acts 1861, p. 141) went into force. The damages claimed were two hundred dollars. On appeal to the Common Pleas, the cause was dismissed for want of jurisdiction in the justice. *Held*, that the dismissal was error, and that the justice had jurisdiction of the cause.—*Leathers v. Hogan et al.*, 242
2. Suit before a justice of the peace, against *Lima* township, alleging that in 1853, the proposition was submitted to the voters of said township to assess a special tax for common school purposes; that said proposition was carried, and a tax assessed, which amounted on plaintiff's property to eighty dollars; that said tax was placed upon the tax duplicate, and collected by the county treasurer, and paid over to the township; that said tax was illegal, &c. *Held*, that though the complaint would not have been sufficiently certain, if the suit had been begun in the Circuit or Common Pleas Court, yet it was good before a justice.—*Jenks v. Lima Township*, 326

L.

LANDLORD AND TENANT.

See TITLE BOND, 2.

LEGACY.

See WILL, 8, 9, 10, 11, 16, 17.

Lapsed. See WILL, 8.

Ademption of. See WILL, 9, 10, 11.

LEVY.

Not Necessary under Foreclosure. See EXECUTION, 10, 11.

LEX LOCI.

1. The place of the delivery of a bond or note, and not the place where it is dated, or signed, is the place of its execution.—*Buller et al. v. Myer*, 77
2. A contract made in one State, to be performed in another, is to be governed by the law of the place of performance, so that if a contract is illegal, on account of usury, by the law of the place where it is made, it may still be upheld by virtue of

the law of the place of performance.

Ibid.

3. *Quære*: Whether a contract, valid by the law of the place where it is made, and where both parties reside, when sought to be enforced in the Courts of the State where it was made, will be held void because the law of the State in which the parties have fixed the place of performance would make it void. *Ibid.*

LIEN.

See EXECUTION, 8, 9.

1. On December 28, 1857, A. recovered two judgments against B., before a justice of the peace, for the sum of \$200 each, and immediately thereafter filed in the clerk's office of the proper county, certified transcripts of the said judgments. On January 5, 1858, C. purchased of B. a tract of land in said county, and paid him the purchase money in full. Afterward, on January 29, 1859, the transcripts, together with the order book in which they were recorded, were destroyed by fire, and on March 26, 1859, the justice again made out transcripts, which were filed, and executions issued thereon were levied on the real estate purchased by C. Suit to enjoin the sale. *Held*, that the judgments, upon the filing of the first transcripts, became liens on the land, but those transcripts, and the records thereof, having been destroyed, no executions could issue thereon until they were reinstated, in the mode pointed out by 2 R. S., § 20, p. 510.—*Sheldon et al. v. Arnold*, 165
2. The judgments, as evidenced by the second transcripts, were not liens on the land; and *quære*, whether the filing of the new transcripts was not a waiver of the liens of the old. *Ibid.*
3. Where a grain rent is reserved in a lease, with a condition that the lessor shall hold the crop as security for the rent, the lien attempted to be reserved for the rent would be inoperative as to a purchaser in good faith, without notice, but would be good against a naked wrong doer, who would have no claim but possession, derived through the wrongful act.—*Fowler et al. v. Hawkins*, 211
4. On April 2, 1849, a judgment was recovered against A., in a prosecution for bastardy, for \$265, which was directed by

the Court to be paid in installments, running through a period of twelve years. *B.* became replevin bail upon the judgment, and afterward, in 1855, sold and conveyed to the plaintiff a tract of land owned by him in the county. On *May 14*, 1860, an execution was issued upon the judgment, and levied upon the land so sold by *B.* Suit to enjoin the sale. *Held*, that ten years having elapsed after the recovery of the judgment, and before the issuing of the execution, and the plaintiff not having been prevented from proceeding thereon, during any portion of such time, "by the operation of any appeal, or writ of error, or by the injunction of any judge or court," the lien of the judgment was discharged.—*Castle v. Fuller et al.*, 402

LIMITATIONS.

Of Action against Officer. See COUNTY COMMISSIONERS, 4.

LIQUOR.

Selling. See INDICTMENT, 7, 8.

Law 1853, p. 87, Unconstitutional. See CONSTITUTIONAL LAW, 8.

Bond under Act 1853, p. 87, Void. See CONSTITUTIONAL LAW, 8.

The liquor law of 1859 does not give an appeal from the judgment of a justice in a prosecution for a violation of that law, and as the general statute on the subject of appeals from justices in criminal cases only gives an appeal to the Common Pleas, no appeal will lie to the Circuit Court from the judgment of a justice for a violation of the liquor law.—*Dearth v. The State*, 523

LIS PENDENS.

See EVIDENCE, 3.

M.

MALPRACTICE.

By Physician. See PLEADING, 11.

MANDAMUS.

On *September 28*, 1861, *A.*, who was the judge of the Court of Common Pleas for the 12th District of the State of *Indiana*, vacated said office, and on *September 30*,

the vacation of said office became constructively known to the public, through the appointment of *B.* by the Executive of the State, as the successor in said office, and the entering of *B.* upon the duties of said office. On *Tuesday, October 8*, the general annual election for the State took place, and at such election votes were cast for *B.* and *C.*, as follows, viz., for *B.* 3,799 votes, and for *C.* 4,189 votes. Suit by *B.* against *C.* and the Governor of the State, to enjoin the latter from issuing a commission to *C.* and the former from acting as judge of said Court. *Held*, that the Courts could not aid by *mandamus* an officer illegally elected to get possession of the office to which he claims to be elected.—*Beal v. Ray et al.*, 554

MARRIED WOMAN.

See PARTNERS, 2, 3.

Suit on a note and to enforce a mechanic's lien. The note was executed by *W.*, but the complaint averred that it was given for work performed and materials furnished at his request, as agent for his wife, in the erection of a house on her property. The defendants answered separately: *W.* by denial and payment; his wife by denial, and that she was a married woman, the wife of *W.*; that the premises described were her "own individual property, in her own right, in fee, and not liable for the payment of *W.*'s debt, being the claim sued on." The plaintiff replied to the second paragraph of the answer of *W.*, and demurred to the second paragraph of the wife's answer. Trial, and finding for plaintiff against both defendants; order of sale, &c., without any disposition of the issue of law raised by plaintiff's demurrer. *Held*, that as to the wife the proceedings were erroneous, as the issue of law should have been disposed of before the trial of the issues of fact.—*Waldo et al. v. Richter*, 634

MECHANIC'S LIEN.

See PRACTICE, 43.

1. A mechanic's lien can be enforced, under our statute, for work done and materials furnished in the erection of a school-house, built by order and contract of a township trustee.—*Shattell v. Woodward*, 225

2. The lien of a mechanic for work done or materials furnished in the construction of a house, only takes effect from the time of filing his notice in the recorder's office.—*Millikin et al. v. Armstrong et al.*, 456
3. Fixtures used in, and attached to, a building used for manufacturing purposes, will pass by a mortgage of the freehold. *Ibid.*
4. Whether a mechanic's lien, like a vendor's, would be waived by taking collateral security, is regarded as doubtful; but certainly the taking of the note of the debtor, in their co-partnership name, indorsed by some of them individually, would not waive the lien, as no additional security would be required. *Ibid.*
5. The lien of a mechanic for work done, or materials furnished, in the construction or repair of a house, &c., does not attach, that is, is not acquired, until the notice of intention to hold the lien is filed in the recorder's office of the proper county.—*Waldo et al. v. Walters et al.*, 534
6. Suit on a note and to enforce a mechanic's lien. The note was executed by *W.*, but the complaint averred that it was given for work performed and materials furnished at his request, as agent for his wife, in the erection of a house on her property. The defendants answered separately: *W.* by denial and payment; his wife by denial, and that she was a married woman, the wife of *W.*; that the premises described were her "own individual property, in her own right, in fee, and not liable for the payment of *W.*'s debt, being the claim sued on." The plaintiff replied to the second paragraph of the answer of *W.*, and demurred to the second paragraph of the wife's answer. Trial, and finding for plaintiff against both defendants; order of sale, &c., without any disposition of the issue of law raised by plaintiff's demurrer. *Held*, that as to the wife the proceedings were erroneous, as the issue of law should have been disposed of before the trial of the issues of fact.—*Waldo et al. v. Richter*, 634

MILL DAM.

See AD QUOD DAMNUM, 1, 2

MINISTERIAL ACT.

Defined. See CONSTITUTIONAL LAW, 2, 3, 4.

MISJOINDER.

A judgment can not be reversed for error committed in sustaining or overruling a demurrer for misjoinder of causes of action.—*Knowlton et al. v. Murlock*, 487

MORTGAGE.

See FORECLOSURE, 1, 2.

1. On January 22, 1856, *A.*, by his agreement in writing, sold, and agreed to convey to *B.*, lot No. 70, in *Woods'* addition to the city of *Indianapolis*, for the sum of \$800, \$400 of the purchase money to be paid March 1, 1856, and the residue March 1, 1857; a deed to be made on the payment of the first installment of the purchase money, and the residue to be secured by a mortgage on the premises. The first payment was not made on March 1, 1856, nor was a deed then tendered. On May 2, however, *B.* paid \$400, and the agreement was so far modified, as to extend the time of making the deed until May 2, 1857. *A.* and wife, at the same time, executed to *B.* a mortgage upon lot No. 71, in said addition, the separate property of the wife, to secure the payment of said sum of \$400, so paid by *B.* on the purchase of lot 70. Contemporaneously with the execution of said mortgage, *B.* executed a written agreement, reciting the making of the mortgage, and conditioned that the same should be void, on the conveyance of lot No. 70 to him, on or before May 2, 1857. Before the time last named, *A.* died intestate, without having conveyed said lot, leaving his widow and one child his heirs surviving. *B.* continued in the occupation of said lot No. 70, without having paid or tendered the balance due on the lot. Suit by an assignee of *B.* upon the mortgage, to recover the \$400. *Held*, that the mortgage and written instrument, being contemporaneous, and having reference to the same subject matter, must be held to be one contract; and that the original agreement was not annulled by the new, but merely modified as to time of payment, and by securing the making of a conveyance by a mortgage on another lot.—*Cressey et al. v. Webb*, 14
2. The suit, though based upon a mortgage, was in fact a suit to recover purchase money, advanced upon a contract for the sale of real estate, and the plaintiff could

- not recover, unless *B.* had placed himself in a position to rescind the contract; and this he had not done, as he still held possession of the premises under the contract of sale. *Ibid.*
3. Where a prior mortgagee, at the time of filing his bill for foreclosure, has either actual or constructive notice of a junior mortgage, or other subsequent incumbrance, he is bound to make the holder thereof a party to the action, or the proceedings therein will not affect him.—*Murlock v. Ford et al.*, 52
4. Where several notes maturing at different times are secured by the same mortgage, they are like so many successive mortgages; the first one due has priority, and the others come in, in the order in which they mature. *Ibid.*
5. If the notes secured by a mortgage are held by different persons, and the holder of the deferred notes is not made a party to a proceeding by the holder of the first notes for a foreclosure, his rights are not affected, and he may redeem, as against a purchaser on such decree. *Ibid.*
6. The purchaser is, in such case, if he goes into possession under the sheriff's sale, liable to be charged with the rents, and also with waste committed by him. *Ibid.*
7. *P.* gave a mortgage to *D.* upon real estate, to secure the payment of \$100, on or before November 15, 1859, and \$140, on or before August 19, 1860, the purchase money of the mortgaged premises. No note, bond or other instrument was made by *P.* for the payment of said sums. On July 27, 1860, *P.*, *D.* and *L.* made a verbal agreement, by which *L.* was to purchase the mortgaged premises, subject to the mortgage, assume the payment of the mortgage debt, and pay *D.* \$50, on demand. *D.* agreed, on his part, to extend the payment of the balance of the mortgage debt, until July 1, 1861. In accordance with this agreement, *L.* purchased the mortgaged premises, and paid *D.* the \$50. Before the expiration of the time agreed upon, *D.* brought a suit for the foreclosure of the mortgage against *P.* and *L.* *L.* answered, setting up the foregoing facts. *Held*, that the agreement was valid and binding, and suspended *D.*'s right to foreclose until the expiration of the time to which payment was agreed to be extended.—*Loomis et al. v. Donovan*, 198
8. A suit to foreclose is an appeal to the equity powers of the Court; that the suit in this case was brought in bad faith, in fraud of the rights of *L.*, and that upon the defense set up being established, it should have been dismissed without prejudice. *Ibid.*
9. Where in a suit for the foreclosure of a mortgage, the mortgagor has not sold his equity of redemption, it is not necessary to aver in the complaint that the mortgage has been recorded.—*Culph et al. v. Phillips et al.*, 209
10. Suit to foreclose a mortgage by an assignee holding two, of three, mortgage notes. The defendant answered, that the assignee of the second note, being a person other than the plaintiff, had sued and obtained judgment for the amount, and for foreclosure, &c.; no record of the judgment was filed with, or made a part of, the answer. *Held*, that the answer was bad, and that a demurrer thereto was correctly sustained.—*Severson et al. v. Moore*, 231
11. In a proceeding for the foreclosure of a mortgage, the original mortgage was filed with the complaint, but was not given in evidence to the jury. After a verdict for the plaintiff, the Court entered a decree of foreclosure, &c. *Held*, that after the jury had found the amount due to the plaintiff upon the mortgage, it was the duty of the Court, if the evidence warranted it, and the party desired it, to order the foreclosure, and for that purpose the mortgage was before the Court.—*Brown v. Shearon*, 239
12. *A.* having executed a mortgage upon certain real estate, afterward sold the premises to *B.*, who agreed to pay for the same by discharging the notes and mortgage given by *A.*; and to secure the performance of his agreement, executed to *A.* a mortgage upon the same premises. Suit by *A.* against *B.*, to foreclose the mortgages. *Held*, that the mortgage from *B.* to *A.*, was not a mere mortgage of indemnity, upon which *A.* could not maintain an action until he had paid the notes assumed to be paid by *B.*; but that upon the failure of *B.* to pay the

purchase money, in the manner stipulated, an immediate right of action accrued to *A.* upon the mortgage.—*Wells et al. v. Morritt*, 255

13. The covenant of *B.* in the mortgage, to pay the notes of *A.*, was sufficient to authorize an order of execution over against him, if the mortgaged premises did not satisfy the debt. *Ibid.*

14. It is only in cases where there are installments secured by a mortgage, some of which are not due, that the Court is required to inquire as to the divisibility of the mortgaged premises.—*Benton et al. v. Wood*, 260

15. Suit by *A.* against *B.*, the mortgagor, and *C.*, the owner of the equity of redemption, to foreclose a mortgage. *C.* answered that *A.* had purchased the land of a railroad company and conveyed it to *B.*; that the title of the company came to be disputed, and that it was agreed by *A.*, in consideration that *C.* would purchase the mortgaged premises, and assume the payment of the mortgage, that he, *A.*, would procure from the grantor of the railroad company a conveyance to *C.*, to cure said supposed defect in the title, and that the time of payment of the mortgage should be extended until such conveyance was obtained; that *A.* had never procured said deed, &c. *Held*, that the answer presented a good defense to the action.—*Branham v. Cossett*, 502

16. The recovery of a general judgment upon the notes secured by a mortgage is no bar to an action of foreclosure upon the mortgage.—*Jenkinson v. Ewing*, 505

MUNICIPAL LAW.

See CITY. STREETS, 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15.

1. The charter of the *City of Madison* (Local Laws, 1848, p. 89,) provides for the election of an assessor on the first *Monday in April*, and requires him forthwith, after his election, to make out the tax list of persons and property, and to complete the same by the first of *July* following, and that time shall not be allowed for that purpose beyond *September* first, following. The collector is, however, authorized, while engaged in collecting the taxes, to list persons and property

which the assessor failed, or omitted, to list. The charter also authorizes a tax upon bank notes. *Held*, that under these provisions of the charter, persons, or property, becoming taxable after the first of *September*, as bank stock created after that time, could not be listed for taxation, since the assessor can not be said to have failed or omitted to list, that which then did not exist as a subject of taxation.—*King v. The City of Madison*, 48

2. The provision of the city charter which authorizes a tax upon bank stocks, is controlled, as to the stock of the Bank of the State of *Indiana*, by the charter of that bank, which in express terms exempts such stock from taxation for municipal purposes; and this exemption relates to all legal modes of taxation. *Ibid.*

N.

NEGLIGENCE.

1. On *August 29, 1856*, a locomotive and train of gravel cars were standing, temporarily, on the railroad track, at a station on the line of said road; and about the time the train started to back down the road, two persons, a father and son, started to come up toward the station on the railroad track, from a mill, a short distance below. As the train approached them, the son stepped off the track, but perceiving that his father was still on the track, and in the way of the advancing train, the son stepped back, and took him off the track, but was not able, himself, to avoid the train, but received an injury, resulting in the loss of his leg. The train was not moving faster than four miles per hour, and the persons managing the train, when they perceived that both persons did not leave the track, reversed the engine, and made every effort to stop the train. *Held*, that the injury complained of did not result from any want of care, on the part of the company, or her employees, and hence, the company was not liable for damages.—*The Evansville, &c Railroad Co. v. Hiatt*, 102

2. That when a plaintiff is in fault, but the defendant is aware of it in time to avoid injuring him, by reasonable diligence, the failure to use such diligence is held to be,

- alone, the proximate and immediate cause of the injury. *Ibid.*
3. That in this class of cases, the complaint must show, by averment, that the plaintiff was not in fault, but that the wrongful act of the defendant, alone, was the proximate cause of the injury. *Ibid.*
4. The personal representatives of a person whose death was caused by the wrongful act of another, can maintain an action therefor only where the deceased might, had he lived, have maintained an action for an injury, the result of the same act or omission; and this he could not have done, if his own misconduct contributed directly to the tortious act or omission from which the injury resulted.—*Lofton v. Vogles, Administrator of Vogles*, 105
5. The rule of the common law, that it must appear that the person committing the tortious act has been prosecuted criminally to conviction, before a civil suit can be maintained for the injury, does not prevail in the *United States*. *Ibid.*
6. *Quære*: Whether, under our code, an action in the nature of an action on the case at law can not be maintained against a trustee for negligence.—*Bennett v. Preston et al.*, 291
4. Motion for a new trial upon the following grounds, viz., 1. "For irregularities in the proceedings of the Court, and abuse of discretion, by which the defendants were prevented from having a fair trial. 2. On account of accident and surprise, which ordinary prudence could not have guarded against. 3. Errors of law occurring at the trial, and excepted to." *Held*, that the reasons assigned were too vague and indefinite to bring any question to the attention of the Court. *Ibid.*
5. In proceedings for a new trial under § 356 of the code for causes discovered after the term, the record of the previous trial is not the foundation of the suit, and hence, a transcript thereof need not be filed with the complaint.—*McKee v. McDonald et al.*, 518
6. A motion for a new trial on the ground that the verdict is not sustained by sufficient evidence, will not present any question of "excessive damages," as that is made by statute a distinct cause for a new trial.—*Spurrier et al. v. Briggs*, 529
7. An erroneous admission of testimony on the trial is not brought in review by a general assignment in the motion for a new trial of "errors of law occurring at the trial," &c., but where excessive damages is also assigned as a cause, the Supreme Court will look into the question of the illegality of the testimony in determining the question of excessive damages.—*Oiler et al. v. Bodkey et al.*, 600

NEW TRIAL.

Assignment of Causes for. See ERROR, 1, 2, 4.

1. Where the jury have, with a general verdict, returned answers to interrogatories propounded to them, and the party against whom the general verdict is rendered has moved for judgment in his favor on the special findings, and excepted to the overruling of his motion, no motion for a new trial is necessary in order to bring the ruling in review in the Supreme Court.—*Horn v. Eberhart*, 118
2. In a motion for a new trial, for errors of law occurring at the trial, each error relied upon must be specifically presented to the Court.—*Ham et al. v. Carroll*, 442
3. Errors of law occurring on the trial, as in the refusal to grant a continuance, or in the admission of improper evidence, must be assigned in the motion for a new trial, or they can not be noticed on appeal.—*Scoville et al. v. Chapman*, 470
1. In *August*, 1850, A. obtained a decree in chancery against B., for the specific performance of a contract for the purchase of a tract of land, by which said land was ordered to be conveyed to him. A commissioner was appointed to make the deed, which was made, reported to the Court, approved, and recorded among the records of the Court, but was not recorded in the recorder's office until

NOTICE.

See PURCHASER, 2, 3, 4.

Decree without Notice of Suit is Void. See JURISDICTION, 12, 13, 14.

Of Mechanic's Lien. See MECHANIC'S LIEN, 2, 5.

Of General Annual Election. See ELECTION, 5.

January, 1855. Pending the suit for specific performance, *B.* sold and conveyed the land to *C.*, who afterward conveyed to *D.*, who purchased for a valuable consideration, and in good faith, and had his deed duly recorded. *Held*, that by the law requiring the recording of deeds, it was intended that such record should be constructive notice, and should dispense with proof of actual notice of incumbrance, transfers, &c.—*Rosser v. Bingham*, 542

2. The record of the chancery suit was not such constructive notice as was binding upon the purchasers subsequent to *C.* *Ibid.*
3. Though the statute (R. S., 1843, § 86, p. 848) made the decree itself, in the absence of a commissioner's deed, operate as a transfer of title in substance therein specified, yet to constitute notice, it should be recorded in the county where the land is situated. *Ibid.*

NOTICE AND MOTION.

1. Suit to recover certain real estate, which the plaintiff had been induced to subscribe to the stock of a company, through the false and fraudulent representations of her agent. The complaint averred that the plaintiff was ready and willing, and offers to bring said stock into Court, to be disposed of in such manner as the Court may direct. The Court below, on motion of the defendant, ordered the plaintiff to furnish the defendant with inspection of the certificates of stock by him subscribed, the motion being founded on the pleadings alone, and there being no evidence of notice to the plaintiff to produce. For the failure of the plaintiff to comply with this order, the cause was dismissed, without prejudice. *Held*, that §§ 305 and 306 of the code (2 R. S., p. 97), relate to papers which the adversary party desires to use in evidence, and not to papers of which a mere inspection is demanded, and which are set forth or referred to in the pleadings.—*Silvers v. The Junction Railroad Co.*, 142
2. At common law the rule is, that where the form of action, or the pleadings, give the party notice to be prepared to produce a written instrument, no other notice to produce it is necessary; and §§ 305

and 306, *supra*, were not intended to change this rule. *Ibid.*

3. Sections 305 and 306, *supra*, construed with § 363 (2 R. S., p. 120), authorize the Court, for disobedience of an order to produce papers, either to "allow parol evidence to be given of their contents," or "to exclude the evidence, and punish the party refusing," or, to dismiss the suit without prejudice. *Ibid.*

NUISANCE.

Failing to keep Bridge in Repair. See INFORMATION, 5, 6.

O.

OFFICER.

See PRINTER, 1, 2, 3.

OPEN AND CLOSE.

Right to, when General Denial is waived. See PRACTICE, 49, 50.

Where there are two paragraphs in a complaint, to one of which affirmative answers only are pleaded, while the other is denied, if the plaintiff introduces any evidence having a tendency to support the latter paragraph, he is entitled to open and close the argument.—*Shaw et al., Administrators of Shocum v. Barnhart*, 183

P.

PARENT AND CHILD.

See ATTACHMENT, 1.

Tort to Child. See ACTION, 4.

PARTIES.

Husband and Wife Properly Joined. See PLEADING, 1.

Motion to Make. See PRACTICE, 21.

Defect of. See DEMURRER, 5, 6.

To Enforce Mechanic's Lien. See PRACTICE, 43

1. Section 522 of the code which authorizes a proceeding against persons who may have property of the debtor in their hands, or who may be indebted to him, contemplates that the execution defendant

- is to be made a party with such other persons.—*Chandler et al. v. Calkwell*, 256
2. The assignor of an account must, in an action thereon by his assignee, be made a defendant to answer as to his interest; but the mere fact of naming him as a defendant, does not make him "an adverse party," nor is he a competent witness for the plaintiff to prove the account.—*Swails v. Coverdill*, 337
 3. Where the mortgagor has sold his equity of redemption in the mortgaged premises, he is not a necessary party to a bill for foreclosure, but the order of sale, in such case, should be limited to the mortgaged premises, and no personal judgment taken against the holder of the equity of redemption.—*Burkham v. Beaver*, 367
 4. In a suit for partition of lands, one of the defendants filed a cross-complaint, setting up a claim of exclusive ownership in the land by purchase from the common ancestor, and making all the other parties defendants. *Held*, that the other heirs were made by the cross-complaint adverse parties, as to the matters alleged therein, and were not competent witnesses to disprove the allegations of said cross-complaint.—*Cluster v. Gibson et al.*, 477
 4. All questions of title and possession may, under the statute, be settled in a suit for the partition of lands. *Ibid.*
 5. An appeal will lie to the Supreme Court from an order of sale, in a proceeding for the partition of lands, made on report of the commissioners that the land is not susceptible of division.—*Hunter et al. v. Miller et al.*, 88
 6. In a proceeding for partition of lands, instituted by persons claiming to be entitled by descent, against others, some of whom claim to hold as tenants in common with the plaintiffs, by descent from a common grantor, and others of whom claim, by purchase from the ancestor, an adverse and exclusive title to the whole property, the former class of defendants are not competent witnesses for the plaintiffs, to prove that the deed, under which their co-defendants claim an exclusive title, was obtained by fraud, or that the grantor was insane. *Ibid.*
 7. A person purchasing of a commissioner appointed to sell real estate, in proceedings for partition, is not entitled to a deed under the statute, until the purchase money has been paid.—*Swain et al. v. Morberly*, 99

PARTITION.

Service upon Testamentary Guardian is Good.
See PRACTICE, 55, 57.

1. As the Circuit Court is a court of general and unlimited jurisdiction, its authority to proceed in the trial of a cause need not affirmatively appear in the complaint; and hence in a petition for partition of lands, it need not be averred that the land lies in the county where the suit is brought.—*Godfrey v. Godfrey et al.*, 6
2. An objection to a petition for partition, on account of the indefinite description of the land sought to be partitioned, can not be taken by demurrer, but must be taken by a motion to have the pleading made certain and definite. *Ibid.*
3. The word "holding," as used in §1 of our statute concerning the partition of lands, (2 R. S., p. 329,) does not require actual occupancy, but is equivalent to "owning" or "having title to" lands. *Ibid.*
5. In a suit for partition of lands, one of the defendants filed a cross-complaint, setting up a claim of exclusive ownership in the land by purchase from the common ancestor, and making all the other parties defendants. *Held*, that the other heirs were made by the cross-complaint adverse

parties, as to the matters alleged therein, and were not competent witnesses to disprove the allegations of said cross-complaint.—*Cluster v. Gibson et al.*, 477

PARTNERS.

1. One partner may assign his interest in an open account due the firm, to his co-partner, so as to enable the latter to maintain an action thereon in his own name.—*Swais v. Coverdill*, 337

2. A. had recovered a judgment for the foreclosure of a mortgage against B. and wife, for \$986, and afterward two other judgments, amounting to \$1,014, were recovered by other parties against B. and C., as partners. Executions upon the judgment of foreclosure, as well as upon the other judgments, were placed in the hands of the sheriff, who levied the latter upon the mortgaged premises, and having duly advertised the premises, sold the same upon the decree of foreclosure to A., for \$2,105, who refused to pay the purchase money, a deed having been tendered. Motion, under § 476 of the code, for judgment against A. for the amount of his bid, and for damages thereon. Answer: that the premises sold were the separate property of B. and wife, and that the debts for which the other judgments were recovered were the co-partnership debts of B. and C., and that said co-partners had sufficient partnership property in the county out of which to make said judgments; that defendant had tendered to the sheriff the costs due on the order of sale, and his, defendant's, receipt for the amount due to him as plaintiff in said decree of foreclosure, and also the receipt of B. for the residue. Held, that the executions against B. and C. might lawfully be levied upon the property of either, and having been levied upon the premises mortgaged to A., the overplus, after paying the mortgage debt, was applicable to the payment of the other executions, and hence the receipt of B. for such overplus was not a good tender to the sheriff.—*Dean v. Phillips*, 406

3. The premises having been sold upon the foreclosure of a mortgage, in the execution of which A.'s wife had joined, her interest in the land was gone, and the surplus arising from the sale belonged to A., and

was applicable to the payment of his debts. *Ibid.*

4. The creditors of a firm may collect their debts out of the property of the one partner, notwithstanding there may be joint property out of which the debt might be made, unless that partner has separate creditors who are entitled to be first paid out of such assets. *Ibid.*

PARTNERSHIP.

See PLEADING, 1.

Property Liable for Individual Debts. See PARTNERS, 2, 4.

The doctrine that partnership assets must first be applied to the payment of partnership debts, does not apply to cases where the partnership still exists, but only to cases where the principles of equity are brought to interfere in the distribution of partnership property among the creditors; the partners having a legal right, during the continuance of the partnership, to dispose of their property as they please.—*Schaffer et al. v. Fithian et al.*, 463

PAUPERS.

1. Section 24 of the act for the relief of the poor, (1 R. S. 1852, p. 405,) authorizes relief to be granted to persons, not inhabitants of the township, who may be found lying sick therein, or in distress, without friends or money, and renders the county liable therefor.—*The Board of Commissioners of Jefferson County v. Rogers*, 341

2. Section 8 of the act to limit allowances, &c., (1 R. S. 1852, p. 101,) which provides for the employment by the county board of one or more physicians to attend upon the poor, has reference only to such poor as are settled in the county, and does not include strangers entitled to temporary relief; and hence the overseer of the poor may employ another physician to attend upon such strangers, and the county will be liable therefor. *Ibid.*

PHYSICIAN.

Malpractice. See PLEADING, 11.

To Attend the Poor. See PAUPERS, 1, 2.

PLEADING.

See NEGLIGENCE, 3. COUNTY COMMISSIONERS, 1. SET-OFF, 1. INFANCY, 1, 2. DEMAND, 2, 4.

Pleading in Supreme Court. See ERROR, 1.

Defects in, on Appeal. See PROMISSORY NOTES, 12.

An Award in Pending Suit should not be Plead. See PRACTICE, 39.

All Defenses under General Issue by Agreement. See PROMISSORY NOTES, 28, 29.

1. Suit against *A., B., and C.* upon a promissory note, alleged to have been made by them, by their co-partnership name of *A. & Co.*, to the order of *A.*, and by him indorsed to the plaintiff. *A.* made default. *B. and C.* answered, that *A.* had caused the clerk of the co-partnership to make said note and deliver it to him, and that he had indorsed it to the plaintiff for a private debt, all of which he well knew, &c. Without replying to the answer of *B. and C.*, the plaintiff had the damages assessed against *A.*, on his default, and took final judgment against him. No further steps were taken in the cause at that term, nor was the cause continued as to *B. and C.* At the next term of the Court, the plaintiff asked leave to file a reply to the answer of *B. and C.*, which was objected to by them, and a motion interposed to strike the cause from the docket. Pending this motion, *A.* moved, on affidavit, to set aside the default and judgment against him, and the plaintiff confessing the errors alleged, the default and judgment were set aside. Thereupon, the Court overruled the motion to strike the cause from the docket, and permitted a reply to be filed. *A.* was again defaulted; trial by the Court, and judgment against all the defendants. *Held*, that the first judgment against *B.* was properly taken, so far as any question as to joint liability was concerned, as the facts pleaded by *B. and C.*, at most, only defeated the action as to them.—*Rose et al. v. Comstock et al.*, 1

2. By failing to reply to the answer of *B. and C.*, and by taking final judgment against *A.*, the plaintiff abandoned the suit as to *B. and C.*, and a discontinuance of the cause, as to them, resulted. *Ibid.*

3. This case does not come within § 269, 2 R. S. 1852, p. 121, which provides that the Court may, in its discretion, render judgment against one or more defendants, leaving the action to proceed against the others, whenever a several judgment is proper; first, because the Court did not exercise this discretion, or make any order that the case should be left to proceed; and, second, because this was not a case where a several judgment could be rendered against *B. and C.*, since, if they were liable at all, it was jointly with *A.* *Ibid.*

4. When final judgment was taken against *A., B. and C.* were out of Court, and the cause was, as to them, finally disposed of, and it was error to take any subsequent proceedings against them. *Ibid.*

5. Suit against *A. and B.* upon a promissory note. The defendants answered, separately: 1. Usury, going to the entire note; 2. Want of consideration. Reply to the answer setting up usury, that defendants had before that time filed their bill in chancery, alleging the matters now set up in the first paragraph of their answers, and asking that the plaintiff be enjoined from collecting said note; that upon the hearing of said chancery cause, it was decreed that plaintiff be enjoined from enforcing the collection of said note, except as to the sum of \$296, with interest from the date of the note. Afterward, *A.* withdrew his answer, and a default was entered against him. *Held*, that the defendants having instituted a suit to cancel the note, as usurious, and having obtained a decree establishing the alleged usury in part only, could not afterward go behind the decree, and set up the same defense to the residue of the note.—*Sutherland et al. v. Mullis*, 19

6. Had the answer of *A.* stood, neither of the defendants could have been a witness for the other, because the defense set up by each, had it succeeded, would have defeated the action as to both. *Ibid.*

7. In actions *ex contractu*, a plea by one defendant enures to the benefit of all the defendants who do not plead; and if one of several defendants succeeds, upon a plea going to the merits of the action, the plaintiff is precluded from obtaining any benefit from a default suffered by the

- other defendants; and, hence, notwithstanding the default as to *A.*, he was still jointly interested in the defenses pleaded by *B.*, and was not a competent witness to prove them. *Ibid.*
8. *A.*, by his will, devised certain real estate to his wife for life, and at her death to be sold by his executor to the highest bidder among his children. The widow leased the land for the term of her life to one *B.*, who, after her death, continued in possession as a tenant at sufferance. In *September*, 1858, the executor sold the land to a child of the testator, who assigned his certificate of purchase to *C.*, a married woman. The sale was confirmed by the Court, *January* 3, 1859, and the executor ordered to make a deed to *C.*, which he did on *March* 7, 1859. Suit by *C.* and her husband against *B.*, alleging, that on *January* 4, 1859, and on divers other days, between that day and *March* 10, 1859, the said *B.* wrongfully, and without license, turned a large number of hogs upon a meadow, part of said real estate, whereby the same was rooted up and injured; and also dug up and carried away a large number of fruit trees. *Held*, that the husband was properly joined with the wife, as plaintiff.—*Bellows et al. v. McGinnis*, 64
9. The facts stated in the complaint constituted a good cause of action. *Ibid.*
10. It is not necessary that the answer of the defendant in replevin should claim a return of the property; but if the case made by the evidence, authorizes a return, it may be awarded by the Court, after verdict.—*Conner et al. v. Comstock et al.*, 90
11. Suit against a physician, for malpractice. The complaint averred that the defendant was a practicing physician, and, as such, was called on by the plaintiff to visit and treat his child; but contained no averment of any special consideration for the undertaking of the physician, nor any allegation of duty, on which he undertook, &c. *Held*, that though no special consideration was alleged, the promise to pay a reasonable reward was implied, from the employment; and the duty, on the part of the physician, to exercise a reasonable degree of care and skill, resulted from the character in which he assumed to act.—*Peck v. Martin*, 115
12. The complaint was good, on motion in arrest, the defects, if any, being cured by the verdict; in support of which it will be presumed that the plaintiff, in employing the defendant, became bound by an implied promise, to pay him what his services were worth. *Ibid.*
13. Suit to recover the possession of personal property. Answer: 1. General denial. 2. Right of possession in the defendant, by virtue of a chattel mortgage from the plaintiff, but without setting out a copy of the mortgage. Reply: 1. That the plaintiff was, at the time of executing the mortgage, of weak and imbecile mind, and so far insane as to be incapable of understanding the nature of the same, and was unable and unfit to do business, and incapable of assenting to any contract. 2. That said mortgage was procured by fraud, in this, that the defendant fraudulently and falsely represented to the plaintiff, that said mortgage was a promissory note, and he being entirely uneducated, and incapable of judging of the effect of a mortgage, and relying upon said false and fraudulent representations, executed said mortgage, &c. *Held*, that the first reply was good.—*Louchheim v. Gill*, 139
14. The second reply did not show such a misrepresentation of facts as would vitiate the mortgage. *Ibid.*
15. Though the second paragraph of the answer was bad, for not setting out the mortgage, yet the defendant was entitled, under the general issue, to prove that the right of possession was in him. *Ibid.*
16. Where, in an action to recover the possession of real estate, the defendant appears and pleads to the action, his possession of the land, described in the complaint is admitted, under § 597, 2 R. S., p. 167, and hence evidence of the boundaries of the land is irrelevant.—*Volts v. Neubert et al.*, 187
17. The act of 1855 (Acts 1855, p. 57) amending § 596, 2 R. S., p. 167, was not intended to change this rule, or increase the amount of evidence, but only to change the mode of pleading. *Ibid.*
18. To an action of replevin for a horse, the defendant answered that at and before the commencement of the suit, and until the

- horse was taken upon the writ, the same was in another county, &c. *Held*, that the question presented by the answer was one of fact, in abatement, and must have been pleaded, or it would have been waived.—*Keller v. Miller*, 206
19. Pleas in abatement must be filed in their order, and can not be pleaded either with, or after, pleas in bar. *Ibid.*
20. Where the interest in the cause of action is transferred, pending the suit, no additional pleading is required, except, perhaps, to show the transfer. *Ibid.*
21. Where, in a suit for the foreclosure of a mortgage, the mortgagor has not sold his equity of redemption, it is not necessary to aver in the complaint that the mortgage has been recorded.—*Culph et al. v. Phillips et al.*, 209
22. To a suit upon a promissory note, the defendant answered, as to costs, that the plaintiff was a resident of one of the *New England States*, but which one, defendant never knew; that no demand of payment was made before suit, and that defendant did not know where the money could be paid, but was always ready and willing, &c. *Held*, that the answer was bad on demurrer.—*Kirkman v. Allen*, 216
23. Suit to foreclose a mortgage by an assignee holding two, of three, mortgage notes. The defendant answered, that the assignee of the second note, being a person other than the plaintiff, had sued and obtained judgment for the amount, and for foreclosure, &c.; no record of the judgment was filed with, or made a part of, the answer. *Held*, that the answer was bad, and that a demurrer thereto was correctly sustained.—*Severson et al. v. Moore*, 231
24. A. purchased a tract of land for \$400, and received a bond for a deed. Before he had made payment of the purchase money, he assigned the bond to B., who paid the purchase money, and received a deed. Afterward, a controversy having arisen, as to whether the assignment of the bond was absolute, or in trust, A. and B. entered into a written agreement, *October 19, 1858*, by which B. agreed to convey the land to A. for the price of \$900; which was to be paid, in part, at the time of making the deed, and the residue in three yearly installments, to be secured by a mortgage on the premises. This agreement was to be executed, *November 3, 1858*, by the delivery of a deed, on the one hand, and the mortgage and notes, together with the cash payment, on the other. In 1859, B. instituted a suit to recover the possession of the land, averring a tender of the deed. *Held*, that under the general denial, every legal and equitable defense, going to the merits of the case, could be given in evidence.—*Soule v. Holdridge*, 236
25. After pleading the general denial, the defendant can not plead in abatement; and when a cause is on trial on the merits, matter in abatement is inadmissible in evidence. *Ibid.*
26. As the agreement of *October 19*, was fairly executed, upon a compromise of the former controversy, the parties were estopped to go behind it, and reopen that controversy. *Ibid.*
27. As A. failed to show any offer or effort, on his part, to comply with the agreement mentioned, he established no legal or equitable defense to the action. *Ibid.*
28. Where, to an action by a corporation, the defendant pleads the general issue, he admits the capacity of the plaintiff to sue, and can not, at the same time, plead *mutuel corporation*, because a plea in abatement can not be pleaded in connection with a plea in bar.—*Carpenter et al. v. The Mercantile Bank*, 253
29. An answer professing to set up a total, and showing, at most, only a partial failure of consideration, is bad.—*Tyler v. Borland*, 298
30. Suit upon a promissory note for \$406. Answer, as to the whole cause of action, that \$100 of the consideration of the note was for usurious interest. *Held*, that the answer was bad, for pleading in bar of the whole action, facts that were a bar, at most, only to the amount of \$100, and the interest and cost, and that the defect was reached by demurrer.—*Webb et al. v. Deitch et al.*, 340
31. Suit by an assignee upon a promissory note for \$200, payable in currency. Answer: that before notice of the assignment of the note sued upon, the defendant had been summoned as a garnishee in an attachment suit against the payee of

- he note, before a justice of the peace, and judgment rendered against him, which judgment he had paid. The transcript of the proceedings before the justice, showed that the garnishee had answered that he had in his hands \$800 of uncurrent money, belonging to the payee of the note sued upon in this case, worth \$620. *Held*, that the answer was bad, in not showing, affirmatively, that the demand sued for in this case, and that adjudicated before the justice, were identical.—*Sangster et al. v. Butt*, 354
32. In a suit against the assignor of a promissory note, not payable in a bank in this State, the complaint must show that diligence has been used against the maker, or some excuse for the want of diligence.—*Frybarger v. Cockefair*, 404
33. Under the code, want of consideration for a written instrument, of the class which *prima facie* imports a consideration, as the indorsement of a note, must be specially pleaded; and evidence of a want of consideration can not be given, in such case, under the general denial. *Ibid.*
34. Suit against the sureties of an administrator, on a bond given by him on an application to sell real estate, to recover the proceeds of the land sold. Answer: that the administrator, in his lifetime, fully paid and accounted for all of said moneys, except the sum of \$892, which the defendant as his surety had since paid in full. Reply: that after the payment of said alleged balance by the surety, a further accounting took place in the Court of Common Pleas, in the matter of said estate, and by the judgment of said Court said administrator was found in arrears, over and above said supposed balance, in the sum of \$1,125. *Held*, that the reply was a departure, as the money therein sought to be recovered was not shown to have been of the proceeds of the real estate sold, for which only the surety was liable.—*Burtch v. The State, ex rel. Richardville*, 506
35. In proceedings for a new trial under § 356 of the code for causes discovered after the term, the record of the previous trial is not the foundation of the suit, and hence, a transcript thereof need not be filed with the complaint.—*McKee v. McDonald et al.*, 518
36. An answer setting up usury goes only to a part of the cause of action, and should only assume to answer so much, since an answer that assumes to bar the whole cause of action, and in fact only bars a part is bad on demurrer.—*Webb et al. v. Deitch*, 521
37. At common law, even where the statute of frauds required a contract to be in writing, and it actually was so, it was not necessary that a copy of the writing should be made a part of the declaration, nor that it should even be averred that the contract was in writing.—*Booker et al. v. Ray*, 522
38. The averments of a pleading may be made certain by reference to diagrams filed with, and made part of, the pleading. *Ibid.*
39. An answer, setting up defense of usury in bar of too much of the cause of action is bad.—*McIntire v. Whitney, President of the Indiana Bank*, 528
40. A prayer for judgment in a complaint upon a promissory note for the amount of the note and interest thereon, is good, without summing up the amount of principal and interest.—*Spurrier et al. v. Briggs*, 529
41. It is no part of the duty of a clerk to place among the orders of the Court which he is directed to enter, the reasons or causes which influenced the Court in directing such order; but if the ruling is objected to, it should go upon the record by a regular exception taken and signed.—*Hasselback et al. v. Sinton et al.*, 545

POWER OF ATTORNEY.

See ATTORNEY, 2, 3.

Coupled with an Interest. See ATTORNEY, 2, 3.

PRACTICE.

See PLEADING, 12.

Judgment on Special Finding. See VERDICT, 1, 2.

Motion for Inspection of Papers. See NOTICE and MOTION, 1, 2, 3.

Judgment in Foreclosure. See FORECLOSURE, 1.

Cross Complaint. See PARTITION, 9.

1. Suit against A., B., and C. upon a promissory note alleged to have been made

- by them, in their co-partnership name of *A. & Co.*, to the order of *A.*, and by him indorsed to the plaintiff. *A.* made default. *B.* and *C.* answered, that *A.* had caused the clerk of the co-partnership to make said note and deliver it to him, and that he had indorsed it to the plaintiff for a private debt, all of which he well knew, &c. Without replying to the answer of *B.* and *C.*, the plaintiff had the damages assessed against *A.*, on his default, and took final judgment against him. No further steps were taken in the cause at that term, nor was the cause continued as to *B.* and *C.* At the next term of the Court, the plaintiff asked leave to file a reply to the answer of *B.* and *C.*, which was objected to by them, and a motion interposed to strike the cause from the docket. Pending this motion, *A.* moved, on affidavit, to set aside the default and judgment against him, and the plaintiff confessing the errors alleged, the default and judgment were set aside. Thereupon, the Court overruled the motion to strike the cause from the docket, and permitted a reply to be filed. *A.* was again defaulted; trial by the Court, and judgment against all the defendants. *Held*, that the first judgment against *A.* was properly taken, as far as any question as to joint liability was concerned, as the facts pleaded by *B.* and *C.*, at most, only defeated the action as to them.—*Rose et al. v. Comstock et al.*, 1
2. By failing to reply to the answer of *B.* and *C.*, and by taking final judgment against *A.*, the plaintiff abandoned the suit as to *B.* and *C.*, and a discontinuance of the cause, as to them, resulted. *Ibid.*
 3. This case does not come within § 369, 2 R. S. 1852, p. 121, which provides that the Court may, in its discretion, render judgment against one or more defendants, leaving the action to proceed against the others, whenever a several judgment is proper; *first*, because the Court did not exercise this discretion, or make an order that the case should be left to proceed; and, *second*, because this was not a case where a several judgment could be rendered against *B.* and *C.*, since, if they were liable at all, it was jointly with *A.* *Ibid.*
 4. When final judgment was taken against *A.*, *B.* and *C.* were out of Court, and the cause was, as to them, finally disposed of, and it was error to take any subsequent proceedings against them. *Ibid.*
 5. An objection to a petition for partition, on account of the indefinite description of the land sought to be partitioned, can not be taken by demurrer, but must be taken by a motion to have the pleading made certain and definite.—*Godfrey v. Godfrey et al.*, 6
 6. Errors in the amount and form of the assessment and judgment below, will not be noticed in the Supreme Court, when no application has been made to the Court below, to correct the alleged error.—*Black v. Jackson*, 13
 7. Suit against *A.* and *B.* upon a promissory note. The defendants answered, separately: 1. Usury, going to the entire note; 2. Want of consideration. Reply to the answer setting up usury, that defendants had before that time filed their bill in chancery, alleging the matters now set up in the first paragraph of their answers, and asking that the plaintiff be enjoined from collecting said note; that upon the hearing of said chancery cause, it was decreed that plaintiff be enjoined from enforcing the collection of said note, except as to the sum of \$296, with interest from the date of the note. Afterward, *A.* withdrew his answer, and a default was entered against him. *Held*, that the defendants having instituted a suit to cancel the note, as usurious, and having obtained a decree establishing the alleged usury in part only, could not afterward go behind the decree, and set up the same defense to the residue of the note.—*Sutherland et al. v. Mullis*, 19
 8. Had the answer of *A.* stood, neither of the defendants could have been a witness for the other, because the defense set up by each, had it succeeded, would have defeated the action as to both. *Ibid.*
 9. In actions *ex contractu*, a plea by one defendant enures to the benefit of all the defendants who do not plead; and if one of several defendants succeeds, upon a plea going to the merits of the action, the plaintiff is precluded from obtaining any benefit from a default suffered by the other defendants; and, hence, notwithstanding the default as to *A.*, he was still jointly interested in the defenses pleaded

- by *B.*, and was not a competent witness to prove them. *Ibid.*
10. A rule of Court requiring a party desiring written instructions, only, to be given to the jury, to notify the Court of such desire before the trial commences, is repugnant to the laws of this State.—*Lasselle v. Wells*, 33
11. Where the Court has had timely notice of the desire of one of the parties that written instructions, only, shall be given to the jury, it is error for the Court to accompany such written instructions with verbal explanations, and illustrate them by reading from books; and such error was not, in this case, cured by a direction from the Court to the jury, to consider the verbal explanations and illustrations withdrawn. *Ibid.*
12. A bill of exceptions purporting to set out the evidence, must contain the words, "this was all the evidence given in the cause." The words, "this was all the evidence given on said trial" are not sufficient.—*Branham et al. v. Bradford*, 47
13. When the evidence is not in the record, the instructions given by the Court below will be presumed to be correct, if in any supposable state of facts, they would rightly expound the law; and instructions refused will be presumed to have been refused because not applicable to the evidence. *Ibid.*
14. Suit by *A.* against *B.*, to recover the value of certain lumber, alleged to have been furnished to him under a contract that he was to work it up into sash, &c., and pay to *A.* the usual price of such manufactured articles, deducting the cost of manufacturing, and which *B.* was alleged to have wasted, and destroyed, and converted to his own use. *Held*, that *A.* might waive the tortious conversion of the property, and sue in form *ex contractu*.—*Jones v. Gregg*, 84
15. As the evidence is not in the record, this Court can not say that the Court below erred in permitting the plaintiff, after the evidence had closed, to amend his complaint by inserting an averment of a demand, before suit brought. *Ibid.*
16. As the lumber was in the possession of *B.*, only as the agent of *A.*, such portion of it as was not worked up continued to be the property of *A.*, and he could not maintain an action for it, without a previous demand upon *B.* *Ibid.*
17. A law, or amendment of a charter, relating to remedial proceedings, such as the practice on the trial, rules of evidence, &c., may have immediate, instead of prospective operation.—*The City of Indianapolis v. Imberry*, 175
18. Where a party amends his pleading after a demurrer has been sustained to it, he can not complain of the action of the Court on the demurrer.—*St. John v. Hardwick*, 180
19. Under § 364, 2 R. S., p. 120, the plaintiff may dismiss his suit in vacation, by filing a written dismissal with the clerk, as effectually as if dismissed in open Court. *Ibid.*
20. In cases where there are several issues, any one of which being found for the defendant would defeat the plaintiff's right to recover, all the issues must be found for the plaintiff, or he can not recover.—*Shaw et al., Administrators of Slocum v. Barnhart*, 183
21. Suit by an assignee upon a promissory note. Answer: that the payee of the note had notified defendant, that the alleged assignment to the plaintiff was not valid, and that he must not pay, &c., and asking that the payee be made a party. *Held*, that under 2 R. S., § 23, p. 32, the application to have the payee made a party should have been made upon affidavit, before answer.—*Smallhouse et al. v. Thompson et al.*, 204
22. To an action of replevin for a horse, the defendant answered that at and before the commencement of the suit, and until the horse was taken upon the writ, the same was in another county, &c. *Held*, that the question presented by the answer was one of fact, in abatement, and must have been pleaded, or it would have been waived.—*Keller v. Miller*, 206
23. Pleas in abatement must be filed in their order, and can not be pleaded either with, or after, pleas in bar. *Ibid.*
24. Where the interest in the cause of action is transferred, pending the suit, no additional pleading is required, except, perhaps, to show the transfer. *Ibid.*

25. Where a note, secured by mortgage, is payable without relief from the appraisal laws, and the complaint prays for a foreclosure, and other proper relief, a judgment of sale without relief is not erroneous.—*Culph et al. v. Phillips et al.*, 209
26. The Court does not, ordinarily, attempt to control a party as to the order in which he shall introduce his evidence.—*Fowler et al. v. Hawkins*, 211
27. After the Court has commenced to instruct the jury orally, it is too late for a party to require the instructions to be given in writing.—*Boggs v. Clifton*, 217
28. Where a cause is submitted to the Court for trial, there being an issue of law upon demurrer undisposed of, it will be presumed that the issue was decided in the general finding; but it is error to proceed to the trial of issues of fact before a jury, when issues of law remain undisposed of.—*Anderson et al. v. Weaver*, 223
29. An administrator *de bonis non* filed with the clerk of the proper Court, in vacation, his petition for the sale of real estate of the deceased. Notice to the heirs was issued by the clerk, and at the next term of the Court a sale was ordered, in accordance with the petition. The land was sold, the purchase money paid, and a deed executed to the purchaser by order of Court. Proceedings by the heirs of the intestate to review the order directing a conveyance to be made. *Held*, that under the R. S. 1843, the petition of the administrator was properly filed in vacation, and that the clerk had authority to issue notice to the heirs without any special order of the Court.—*Shepherd et al. v. Fisher et al.*, 229
30. An amended paragraph was filed to an answer while the jury was being empaneled, and was not brought to the attention of the opposite party until the evidence had been heard. The plaintiff, by leave of the Court, then filed a reply to the answer, the jury were re-sworn, and the evidence again heard. *Held*, that there was no error in permitting the filing of the reply.—*Brown v. Shearon*, 239
31. A defect in the prayer for relief is not ground for demurrer, but for a motion to make more specific.—*Bennett v. Preston et al.*, 291
32. For a tort committed upon a wife, two actions will lie, as a general rule; one by the husband alone, for the loss of service, expenses, &c., and the other by the husband and wife for the injury to the person.—*Rogers v. Smith*, 323
33. So also for an injury to a child; the father may maintain an action for loss of service, expenses, &c., while the right of action for the personal injury is in the child. *Ibid.*
34. The complaint for such injuries should be framed for the particular cause of action the party has a right to sue for, but where it is drawn so as to include both, it will be presumed, after verdict, that the proof was limited on the trial to the legitimate ground of damages. *Ibid.*
35. Under the code, the joinder of both grounds of action would be duplicity, which should be taken advantage of by motion to strike out, not by demurrer. *Ibid.*
36. Where a defendant appears and pleads in bar of the action, he can not afterward object to the jurisdiction of the Court over his person.—*Ringle v. Bickle*, 325
37. A request of the Court to state a special finding, made after the Court has commenced to render its judgment, comes too late. Perhaps, also, the request should be accompanied with notice to the Court that the party intends to take the cause to the Supreme Court, upon the finding.—*Moore v. Barnett*, 349
38. Perhaps, where a suit pending and at issue is referred by a rule of the Court to arbitrators, the award, if defective, should, like a verdict in such cases, be sent back to the arbitrators, on motion of the dissatisfied party, for correction. *Ibid.*
39. In an action for slander, the parties, by mutual agreement, evidenced by their respective bonds, referred the controversy to the arbitration of certain persons, whose award, it was agreed, should be made a rule of the Court in which the suit was pending. The arbitrators having heard the case, made an award, in which they found that some slanderous words had been spoken by the defendant of the plaintiff, and directed that the defendant should pay the costs of the suit, accrued and to accrue, including the costs of arbitration. The defendant accepted

- the award, and, at the next term of the Court, set it up, by way of answer *puts darrein continuance* to the complaint. *Held*, that the award was valid, and settled the terms of the judgment; but that the defendant, instead of setting up his award by way of answer, should have filed and proved the submission and award, as a paper in the case, on which the Court should have rendered judgment according to the terms of the award. — *Grayson v. Meredith*, 357
40. A want of consideration can not, under the code, be given in evidence under the general denial, as it formerly could under the general issue. — *Bingham v. Kimball*, 396
41. Where there has been a special finding by the Court below, and such finding, together with the evidence on which it was based, is set out in the record, it is not necessary that "all the evidence given in the cause" should be set out, in order to determine the correctness of the special finding. — *Hughes et al. v. McDougle et al.*, 399
42. In a motion for a new trial, for errors of law occurring at the trial, each error relied on must be specifically presented to the Court. — *Ham et al. v. Carroll*, 442
43. In a proceeding to enforce a mechanic's lien, after the jury had been sworn, and the evidence heard, the Court permitted the plaintiff to enter a dismissal as to some of the defendants, so far as a personal judgment was sought against them, but to continue them as parties to the proceedings to enforce the lien. *Held*, that there was no error in this. — *Scoville et al. v. Chapman*, 470
44. Errors of law occurring on the trial, as in the refusal to grant a continuance, or in the admission of improper evidence, must be assigned in the motion for a new trial, or they can not be noticed on appeal. *Ibid.*
45. A judgment can not be reversed for error committed in sustaining or overruling a demurrer for misjoinder of causes of action. — *Knowlton et al. v. Murdock*, 487
46. Where there has been a trial without an issue, in the Court below, the defect must be brought to the attention of that Court, before it can be noticed in the Supreme Court. *Ibid.*
47. It is no part of the duty of a clerk to place among the orders of the Court which he is directed to enter, the reasons or causes which influenced the Court in directing such order; but if the ruling is objected to, it should go upon the record by a regular exception taken and signed. — *Hasselback et al. v. Sinton et al.*, 545
48. Suit upon a bill of exchange against the drawer and acceptor, the complaint alleging, as to the acceptor, that he accepted the said bill in writing, &c. Answer, by the acceptor, under oath, that he "did not undertake and promise as averred," &c. *Held*, that the answer did not put in issue the execution of the acceptance. *Ibid.*
49. Suit by *A.* against *B.*, before a justice of the peace, upon a writing as follows, viz., "Twelve months after date, I promise to pay to the order of *A.*, the sum of eighty dollars and fifty cents, value received; but should the beast prove unsound, a deduction to be made by two disinterested persons." Signed by *B.* This instrument had been assigned in writing to *A.*, and *C.*, the assignor, was made a defendant to answer as to his interest; but, on motion of the defendant, his name was stricken out. Answer: 1. That the note was given for the price of a horse, which was represented and warranted to be sound, &c.; that, in fact, said horse was unsound, &c., by reason of which the consideration of said note had failed. 2. That after defendant had discovered the unsoundness of the horse, he had requested *C.* to select an appraiser, which he refused to do, and that defendant then had said horse appraised, and tendered to *C.* the amount of such appraisal, and now brings the same into Court, &c. The defendant also filed a paper stating that he waived the general denial put in by statute, and all matters of defense, except those by him specially pleaded. *Held*, that the general denial which is put in by statute, without pleading, before justices of the peace, may be waived by the defendant by putting his waiver of record. — *Cross v. Pearson*, 612

50. The defendant, having expressly waived the general denial, was entitled to open and close the case. *Ibid.*
51. By moving to dismiss *C.* as a party to the suit, the defendant waived any rights that might have accrued to him if *C.* had remained a defendant, and *C.*, by submitting to be thus dismissed, without objection, would be as fully concluded by the judgment as if he had continued a party to the record. *Ibid.*
52. There was nothing in the writing to prevent proof being made of a warranty of the horse, but when a warranty was once established, the contract prescribed the remedy for a breach, viz., by deduction from the amount of the note, and neither party could insist upon a return of the horse. *Ibid.*
53. Instructions given or refused by the Court below, to which the counsel of the party objecting has appended an exception, by writing thereon "given and excepted to," or "refused and excepted to," signed by counsel, can not be regarded as part of the record unless signed by the judge also. *Ibid.*
54. Suit on a note and to enforce a mechanic's lien. The note was executed by *W.*, but the complaint averred that it was given for work performed and materials furnished at his request, as agent for his wife, in the erection of a house on her property. The defendants answered separately: *W.* by denial and payment; his wife by denial, and that she was a married woman, the wife of *W.*; that the premises described were her "own individual property, in her own right, in fee, and not liable for the payment of *W.*'s debt, being the claim sued on." The plaintiff replied to the second paragraph of the answer of *W.*, and demurred to the second paragraph of the wife's answer. Trial, and finding for plaintiff against both defendants; order of sale, &c., without any disposition of the issue of law raised by plaintiff's demurrer. *Held*, that as to the wife the proceedings were erroneous, as the issue of law should have been disposed of before the trial of the issues of fact.—*Waldo et al. v. Richter*, 634
55. Suit by a widow for partition of the lands of which her husband died seized, and which by his will he attempted to dispose of to his minor children, who were made defendants. A guardian *ad litem* was appointed for all the minor defendants but one, who had not been served with process, but whose testamentary guardian had been served. Answer by the guardian *ad litem*, that the plaintiff was not entitled to any share of said lands, because of an ante-nuptial agreement, and of the execution of said will, by the husband, disposing of said land. The agreement pleaded provided that the husband was to have the right to dispose of his lands, by will or otherwise, as he might please, provided that if he died first his wife was to be provided with a home and a support on the home farm during her life, and also to have what might remain of any property she might bring to him, she taking care of his children while they were willing to stay with her. Another clause provided that the wife should take care of said children, or cause them to be taken care of and provided for, if the husband should die before they are able to take care of themselves, and that she should also pay the taxes and keep up the farm, &c. The will of the husband devised the land to his minor children. A demurrer having been sustained to this answer judgment was rendered for the plaintiff, without proof, for want of an answer. *Held*, that it was erroneous to render judgment for want of an answer, without proof, and that the Court might have compelled the guardian to put in an answer, or in default thereof have removed him.—*Richards et al. v. Richards*, 636
56. The provisions of the ante-nuptial contract were intended to, and did, exclude the wife from claiming that interest in the lands, which she would otherwise have been entitled to under the law. *Ibid.*
57. The service of process upon the testamentary guardian was sufficient, under the statute regulating partition suits, to bring his ward before the Court. *Ibid.*
58. A judgment of return cannot be awarded, where the evidence fails to show that the property was delivered to the plaintiff in replevin, or, where there has been a failure to assess the value of the property.—*Connor et al. v. Comstock et al.*, 90

PRESUMPTION.

See CONTRACT, 11.

Of Jurisdiction. See JURISDICTION, 7.

After Verdict. See PRACTICE, 34.

1. Where the evidence is not in the record, the Supreme Court will presume in favor of the instructions of the Court below, if in a supposable state of facts, they would be correct.—*Boggs v. Clifton*, 217
2. The Supreme Court will presume in favor of the instructions of the Court below, where the evidence is not in the record, if in a supposable state of facts under the issues, they would have been correct.—*Griffin v. Templeton*, 234
3. There is no presumption of unfair dealing from the fact that the parties occupy to each other the relation of father and son, but the burden of proving fraud, undue influence, or unfair dealing, rests upon him who alleges it.—*Tenbrook v. Brown*, 410

PRINCIPAL AND AGENT.

By Power of Attorney. See ATTORNEY, 2, 3.

1. In order to bind the principal, and make it his contract, the instrument must purport on its face to be the contract of the principal, and his name must be inserted therein, and signed thereto, and not merely the name of the agent, even though the latter be described as agent; and hence, the contract pleaded as a set-off was not the contract of the railroad company, but the individual contract of the plaintiff.—*Prather et al. v. Ross*, 495
2. On August 18, 1856, the common council of the City of Indianapolis, adopted a resolution by which S. was appointed the agent of said city to negotiate certain city bonds, at a rate not less than ninety-seven cents on the dollar, and the mayor of the city was directed to take proper security from S. for the discharge of his trust. S. accepted the trust, and on the same day executed his bond with securities, conditioned that he should well and truly execute said trust, and pay over to the city all moneys that might come to his hands, as such agent. The bonds of the city to the amount of \$25,000, were

then placed in the hands of the agent. Afterward, on September 2, of the same year, the former resolution of the council was so far modified as to authorize the agent to negotiate said bonds at a rate not greater than an interest of ten per cent., and again on October 6 the council modified their former instructions by authorizing the agent to make a loan of \$20,000 for two years, by hypothecation of \$25,000 of bonds. Suit by the city on the bond, alleging that on September 27, 1856, S., in violation of his said trust, borrowed the sum of \$5,000 at thirty days, at seven per cent. interest, and to secure the same, hypothecated \$21,000 of said bonds; that said agent wholly failed and refused to pay over said \$5,000 to the city, and in consequence thereof, and to prevent loss, the city was forced to pay, and did pay, said \$5,000, with a large amount of interest and expenses, &c. Held, that S. having, by his misconduct, obtained the money by a pledge of the bonds of the city, was responsible to his principal for the loss sustained on account of such misconduct, and whether the bonds were properly or improperly pledged in the first instance can not be inquired into by the agent, as his act was so far adopted by his principal as to redeem the bonds pledged by him.—*The City of Indianapolis v. Skeen et al.*, 628

3. The question as to whether the city council transcended its powers in issuing the bonds can not be inquired into in this action either by the agent or his sureties. *Ibid.*
4. Those dealing with the agent, were not compelled to look to the records of the council either for the appointment or instructions of the agent, since they were not necessarily of record. *Ibid.*
5. The city having adopted the act of the agent, by paying the note given by him, the mouths of the agent and his sureties were closed from denying the power of the agent to do the act and receive the proceeds of it, when called upon by his principal for such proceeds, by a suit upon the bond. *Ibid.*
6. There was nothing in the bond sued on, requiring the performance of an illegal act, as the resolution appointing the agent did not necessarily require a sale of the bonds at a usurious rate of interest. *Ibid.*

7. As the second resolution passed by the council after the original resolution of appointment was not acted upon by the agent, and as the third resolution was passed after he had borrowed the money sued for, they could not affect the liability of the sureties by any supposed change in the duties of their principal. *Ibid.*

PRINTER.

1. The act of *March*, 1859, fixing the time and mode of electing a State printer, &c., (Acts 1859, p. 143,) was intended to fix the prices to be paid for the public printing thereafter to be done, whether by the State printer then in office, or by those to be elected under the provisions of that act; and the title of the act was sufficient to authorize such legislation under it.—*Walker v. Dunham, Secretary of State*, 483
2. The act is not obnoxious to the objection that it contains more than one subject, and matters properly connected therewith, as the Legislature may well, in one act, define the duties and fix the compensation of an officer, and provide for the future filling of the office. *Ibid.*
3. The State printer is an officer, and the compensation and duties of an officer may be increased or diminished, in the absence of constitutional restrictions, at the pleasure of the Legislature. *Ibid.*

PROCEEDINGS SUPPLEMENTARY TO EXECUTION.

Against Railroad Company. See *STOCK, SUBSCRIPTION OF*, 3.

1. Proceedings in aid of execution against *A., B. and C.*, alleging the issuing of an execution on a judgment against *A.*, and that *B. and C.* had in their hands personal property, money, rights, &c., belonging to *A.*, with which the judgment might be paid, &c. Answer: 1. Denying that any execution had issued on the judgment. 2. That *B. and C.* held the said goods, &c., by virtue of a deed of trust executed by *A.* in favor of certain of his creditors. The Court found that *B. and C.* had in their hands *choses in action* belonging to *A.* sufficient to pay the plaintiff's judgment, and ordered that they deliver over to the sheriff notes and accounts

sufficient to pay the same. The judgment was rendered on the pleadings and accompanying exhibits, without any proof. *Held*, that § 522 of the code, which authorizes a proceeding against persons who may have property of the debtor in their hands, or who may be indebted to him, contemplates that the execution defendant is to be made a party with such other persons.—*Chandler et al. v. Caldwell*, 256

2. There should have been proof of the issuing of an execution upon the judgment, that fact being denied by the answer. *Ibid.*
3. If the assignment set up in the third paragraph of the answer was valid, the judgment was wrong; and such assignment was not void because it hindered and delayed creditors, and actually prevented some, intentionally, from obtaining payment at all out of the property assigned. *Ibid.*
4. The judgment was wrong in directing the delivery to the sheriff of accounts to be applied on the execution, as they were not subject to sale on execution without the consent of the debtor. *Ibid.*

PROCESS.

Naming Wrong Return Day, Good. See *WRIT*, 1.

Returnable to Wrong Term is Void. See *WRIT*, 1.

May Amend by Complaint. See *SUMMONS*, 1.

The service of process upon the testamentary guardian was sufficient, under the statute regulating partition suits, to bring his ward before the Court.—*Richards et al. v. Richards*, 636

PROMISSORY NOTES.

See *MORTGAGE*, 4, 5, 6. *MECHANICS' LIEN*, 6.

Alteration of, Releases Surety. See *REPLEVIN*, 6.

1. Suit against *A., B. and C.* upon a promissory note alleged to have been made by them, by their co-partnership name of *A. & Co.*, to the order of *A.*, and by him indorsed to the plaintiff. *A.* made default. *B. and C.* answered, that *A.* had caused the

clerk of the co-partnership to make said note and deliver it to him, and that he had indorsed it to the plaintiff for a private debt, all of which he well knew, &c. Without replying to the answer of *B.* and *C.*, the plaintiff had the damages assessed against *A.*, on his default, and took final judgment against him. No further steps were taken in the cause at that term, nor was the cause continued as to *B.* and *C.* At the next term of the Court, the plaintiff asked leave to file a reply to the answer of *B.* and *C.*, which was objected to by them, and a motion interposed to strike the cause from the docket. Pending this motion, *A.* moved, on affidavit, to set aside the default and judgment against him, and the plaintiff confessing the errors alleged, the default and judgment were set aside. Thereupon, the Court overruled the motion to strike the cause from the docket, and permitted a reply to be filed. *A.* was again defaulted; trial by the Court, and judgment against all the defendants. *Held*, that the first judgment against *A.* was properly taken, so far as any question as to joint liability was concerned, as the facts pleaded by *B.* and *C.*, at most, only defeated the action as to them.—*Rose et al. v. Comstock et al.*, 1

2. A condition in a note, or other contract for the payment of money, that if not paid at maturity, interest will be charged from the date of the contract, is valid.—*Brown v. Mauley et al.*, 10

3. So a condition that if a given installment of a debt shall not be paid at a given time, the whole debt shall become due, is valid. *Ibid.*

4. Suit against *A.* and *B.* upon a promissory note. The defendants answered, separately: 1. Usury, going to the entire note; 2. Want of consideration. Reply to the answer setting up usury, that defendants had before that time filed their bill in chancery, alleging the matters now set up in the first paragraph of their answers, and asking that the plaintiff be enjoined from collecting said note; that upon the hearing of said chancery cause, it was decreed that plaintiff be enjoined from enforcing the collection of said note, except as to the sum of \$296, with interest from the date of the note. Afterward, *A.* withdrew his answer, and a default was entered against him. *Held*, that the

defendants having instituted a suit to cancel the note, as usurious, and having obtained a decree establishing the alleged usury in part only, could not afterward go behind the decree, and set up the same defense to the residue of the note.—*Sutherland et al. v. Mullis*, 19

5. The place of the delivery of a bond or note, and not the place where it is dated, or signed, is the place of its execution.—*Butler et al. v. Myer*, 77

6. Where a note is made payable in specific articles, the creditor, on the coming due of the note, may designate a place of delivery, and notify the debtor thereof, and he will then be bound to make delivery at that place; but if the creditor neglects to designate a place of delivery, then the debtor must, at once, after the note has become due, select a proper place, within the reason and spirit of the contract, notify the creditor thereof, if his location is known, and make delivery at that place, and thus discharge the debt.—*Wornack v. Jenkins*, 137

7. If, after the indorsement of a promissory note, the name of another maker is added to the note, without the knowledge or consent of the indorser, the latter is discharged from his liability on the note.—*Henry v. Coats*, 161

8. To a suit by an assignee, upon a promissory note not payable in bank, the defendant answered, that before notice of the assignment of the note, the payee had agreed with him, in consideration that he would pay him another debt of three hundred dollars before the same became due, that he would extend the time of payment of the note sued on. *Held*, that the answer presented a good defense.—*Rigsbee v. Bowler*, 167

9. To a suit upon a promissory note, the defendant answered, as to costs, that the plaintiff was a resident of the *New England States*, but which one, defendant never knew; that no demand of payment was made before suit, and that defendant did not know where the money could be paid, but was always ready and willing, &c. *Held*, that the answer was bad on demurrer.—*Kirkman v. Allen*, 216

10. Suit upon a promissory note made payable in a bank, against the maker and

- indorser, averring due presentment, protest and notice. The note was dated *February 3, 1860*, and was payable one hundred and twenty days after date. The indorser answered by general denial. It appeared in evidence, on the trial, that the note was presented for payment, and protested for non-payment, on *June 5, 1860*. *Held*, that the presentment and protest were premature by one day, as the month of *February*, commercially speaking, never has more than twenty-eight days.—*Kohler v. Montgomery*, 220
11. There being no allegation or proof as to whether the makers had money, or not, at the place of payment on *June 6*, a case was not made out against the indorser. *Ibid.*
12. If the protest and notice were not regarded as part of the complaint, then the averment of due presentment and protest was good; if they were so regarded, then the complaint did not show a legal demand and notice of non-payment, and the defect might be taken advantage of by the indorser on appeal. *Ibid.*
13. Suit to recover the value of a certain promissory note, converted by the defendant to his own use. The Court instructed the jury that if the maker of the note was insolvent, so that he had no property subject to execution, his note was of no value, and the defendant was not liable for its conversion. *Held*, that the instruction was erroneous, as other elements than mere amount of property subject to execution, enter into a man's credit, and the value of his paper.—*Pratt v. Boyd*, 232
14. Suit against *A.* upon a promissory note, as follows, "Due on demand to *B. & Co.*, eleven hundred and four dollars and sixty cents, balance on lumber furnished the State Fair Grounds." (Signed,) "*A.*, Superintendent." Answer: that the note was given for the price of certain lumber, which the payees had before that time sold and delivered to the *State Board of Agriculture*, and was signed by the defendant as superintendent of said board, for the purpose of liquidating the debt, and as the note and obligation of said board, not for the purpose of binding defendant, and for no other consideration, &c. *Held*, that the note having been given for a claim which the payees already had against the *State Board of Agriculture*, and without any new consideration, was *nudum pactum*; the previous indebtedness of the board to the payees not being, of itself, a sufficient consideration to support the promise of *A.* to pay the debt.—*Bingham v. Kimball*, 396
15. In a suit against the assignor of a promissory note, not payable in a bank in this State, the complaint must show that diligence has been used against the maker, or some excuse for want of diligence.—*Frybarger v. Cockefair*, 402
16. An agreement not to sue for a limited time upon a promissory note, is no bar to an action on the note, commenced within the time limited.—*Murphy v. Robbins et al.*, 422
17. *A.* sold to *B.* a tract of land for \$1,200, of which one half was paid in cash, and three notes given for the residue. *A.* indorsed one of the notes to a third person, who sued upon it, but was defeated because the deed tendered by *A.* was not executed by his wife. An agreement was then made between *A.* and *B.*, by which the latter agreed to accept the deed, without the wife's signature, and to pay to *A.* the amount of the note which had been sued upon, and for which *A.* was liable on his indorsement, and also one other of the three notes, the third being at the time surrendered to him by *A.* *Held*, that the conveyance of *A.*, without the wife's signature, was a sufficient consideration to support the agreement.—*Friermood et al. v. Pierce, Administrator of Rouser*, 461
18. Suit upon a promissory note. Answer: that after the making of the note sued on, the defendant, being in failing circumstances, made an assignment for the benefit of his creditors; that afterward a majority of his creditors, the plaintiffs among the rest, agreed with the defendant in writing, that if he would execute to them his notes, with approved security, for one half of his several debts to them, they would discharge him from the whole amount of the original debts; that pursuant to said agreement he did execute said new notes, and that the same were accepted by all of the creditors who executed such agreement, except the plaintiffs, and defendant brings said notes into Court, &c. *Held*, that the answer was good; as

a single creditor, or any number of creditors, may compound with their debtor, so it is not made a condition in the agreement that all the creditors shall come into the same agreement.—*Devou et al. v. Ham*, 472

19. Suit upon a promissory note. Answer: that the note was given for the purchase money of real estate sold by title bond, and that the deed, which was to have been executed on payment of the note, had not been tendered. On the trial, the truth of the answer being established, the Court held the case under advisement until a deed could be made and tendered, and then gave judgment for the plaintiff. *Held*, that this was erroneous.—*Cook v. Bean, Administrator of Burbridge*, 504

20. Suit by *A.* against *B. C.* and *D.*, alleging that before that time he had a judgment against *B.* and *C.*, who were also indebted to several other persons, and that it was agreed between the plaintiff and defendants, that if plaintiff would enter satisfaction of his said judgment, and would pay said other debts, the defendants would execute to him a note for the amount of said judgment and said debts, to be discounted by the *Ohio Insurance Co.*, for his benefit; that plaintiff did accordingly enter said satisfaction and pay said debts, and the defendants, on their part, executed said note, with the said *D.* as surety thereon, payable to the *Ohio Insurance Co.*; and the said company refused to discount the same, wherefore the defendants became liable to pay the amount thereof to the plaintiff, &c. *Held*, that the note was made for the benefit of *A.*, though payable to the insurance company, and was valid notwithstanding the company declined to receive and discount it.—*Spurrier et al. v. Briggs*, 529

21. As the beneficial interest of the note was in *A.*, he was entitled to sue thereon in his own name. *Ibid.*

22. A prayer for judgment in a complaint upon a promissory note for the amount of the note and interest thereon, is good, without summing up the amount of principal and interest. *Ibid.*

23. Suit upon a promissory note. Answer: that the plaintiff was not the owner of the note; but that one *A.* was the owner, the

said *A.* having, before that time, agreed to receive, and the said plaintiff to deliver to him, the said note, in full settlement for certain professional services rendered by *A.* for the plaintiff. *Held*, that *A.*'s right to sue for the value of the alleged services was neither suspended nor extinguished by the agreement to receive the note, broken as it was by the plaintiff, and therefore the title to the note, and the right to sue upon it, remained in the plaintiff.—*Ball et al. v. Silver*, 539

24. The holder of a claim as collateral security may sue on it, and hold the money when collected in place of the note or evidence of debt, even though the debt on which the collateral security was given is not yet due.—*Jones v. Hawkins*, 550

25. An answer to a suit upon a note held as collateral security, alleging that the note was assigned for the security of the plaintiff and one *A.*, who is not joined as plaintiff, is bad, unless it be averred that the interest of *A.* in the note still existed at the time of the suit. *Ibid.*

26. The word "contract" as used in § 23 of the act to authorize and regulate the business of general banking, (Acts 1855, p. 39,) which provides that "contracts made by such association and all bills," &c. "shall be signed by the president or vice-president, and cashier thereof" is employed in a limited, and not in its broad sense; and does not include a contract of indorsement of a note, which may, according to the usage of banks, be made by the cashier alone. *Ibid.*

27. Where a promissory note is assigned as collateral security for a debt less than the amount of said note, the maker of the note may obtain and have a set-off against the payee to the amount of the excess of the note above the debt on which it was assigned as collateral. *Ibid.*

28. Suit against the *Bank of Gosport*, a free bank organized under the law of 1855, upon a bill of exchange drawn by "*A. B.*, Pres.," and alleged to be the bill of said bank, of which the said *A. B.* was then and there president. The bill was indorsed by the drawee in blank, and also contained a subsequent special indorsement, which had been erased. Answer, in denial, with an agreement that all matters

of defense might be given in evidence under it. *Held*, that in carrying on the ordinary, or daily, business of banking, under said free banking law, such as drawing, indorsing, and accepting bills of exchange, giving certificates of deposit, &c., either the president or cashier is authorized to bind the institution, in the absence of any specified manner of transacting said business in the articles of association.—*Allison, President of the Bank of Gosport v. Hubbell*, 559

29. Under the agreement to admit all defenses under the general denial, the assignment of the bill to the plaintiff was not admitted by the failure to deny it under oath. *Ibid.*

30. The evidence of the cashier that the drawing of the bill was a transaction not known to the books of the bank, was not sufficient to relieve the bank from the presumption arising from the face of the bill that it was the bill of the bank, as the president might have received the proceeds for the use of the bank and failed to pay them over. *Ibid.*

31. As the blank indorsement of the payee of the bill was followed by a special indorsement to a person other than the plaintiff, and as this last indorsement, though erased, was necessary to support the protest, which was recited to have been made at the request of the last indorser, the possession of the bill after maturity by the plaintiff, he not being known in the chain of title before that time, nor as a holder, did not raise any presumption that he had acquired title before it became due. *Ibid.*

32. Suit by a railroad company upon a promissory note. Answer: that on March 14, 1855, defendant subscribed for twenty shares of the stock of said company, of \$50 each, upon the express condition that the final location of the road should cross *White* river, near *Martinsville*, and run within one mile of *Gosport*, and continue down on the west side of said river to the town of *Spencer*, and that before the bringing of this suit, said company had finally located said road on the east side of said river; that said promissory note was given in consideration of said subscription, &c. Reply: that the said road had been located, in pursuance of the condition of

said subscription, on the west side of *White* river, &c. The note was dated September 25, 1856. *Held*, that the condition of the subscription was waived by the giving of the note.—*The Evansville, Indianapolis and Cleveland Straight Line Railroad Co. v. Dunn*, 603

33. Suit by an assignee, upon the following instrument, viz., "*Lafayette, Ind., December 4, 1856. Ten months after date, value received, pay to the order of A. B., assignee, five hundred dollars, and charge the same to account of yours,*" &c. [Signed] "*W. C.*" "To *E. W., Esq., Treasurer, N. Y.*" Across the face of the instrument was written, "Accepted for, and on behalf of, *The Toledo, Wabash and Western Railroad Company*, payable at," &c. [Signed] "*E. W., Esq., Treasurer.*" The instrument was indorsed, "Pay the within to the order of *K. & B.*" [Signed.] "*A. B., assignee of J. M. F.*" By an indorsement of *K. & B.* the instrument was transferred to the plaintiff, who caused it to be presented and duly protested, and notices to be given, &c. It was averred in the complaint that *W. C.* was, at the time, &c., a chief engineer of said railroad, and that said bill was drawn on account of labor done in the construction of said railroad, &c. *Held*, that if the doctrine is correct that there are instruments that may be treated by the holder as either a bill of exchange or a promissory note, this was clearly a case in which the holder was entitled to treat the paper as a bill of exchange, and subject to the laws governing such paper, and this right was not waived by the averment that it was drawn by an officer of the company for work done in the construction of the road.—*Burnheisel v. Field et al.*, 609

34. Suit upon a promissory note. Answer: 1. That said note was given in compromise of a pending prosecution for bastardy, fraudulently instituted by the plaintiff against the defendant, in which she falsely represented that defendant was the father of her child; and that the consideration of said note had failed, in this, that subsequently to the giving of said note, it was agreed between plaintiff and defendant that if said child was not born before a given time, that said note should be delivered up and canceled, and that said child was not born before the said time

limited. 2. That said note was obtained by fraud and false representation, in this, that the same was given in compromise of a prosecution for bastardy, in which plaintiff fraudulently and falsely charged the defendant to be the father of her child, she well knowing that one *A. B.* was the father of said child. *Held*, that so far as the first paragraph of the answer averred a want of consideration, it was bad.—*Nicewanger v. Bevard*, 621

35. *Quære*: Whether the consideration shown in the first paragraph of the answer for the alleged agreement to surrender the note was sufficient, and if so, could such agreement be set up as a defense to the action on the note. *Ibid.*

36. The second paragraph of the answer was good. *Ibid.*

PROTEST.

See PROMISSORY NOTES, 10, 11, 12.

PURCHASER.

See NOTOR, 1, 2, 3.

Bona fide. See HUSBAND AND WIFE, 3.

1. Where a deputy clerk issues an execution, without authority from the judgment plaintiff, and without any direction from his principal so to do, and afterward becomes a purchaser at a sale on the execution, he can take no benefit from his purchase, although no actual fraud entered into the transaction.—*Lewis et al. v. Phillips*, 108

2. One who afterward purchased the property from the deputy clerk, without any knowledge of the improvident issuing of the writ, having paid the purchase money and received a deed before notice, could not be disturbed in his title, on account of the want of authority in the clerk to issue the execution. *Ibid.*

3. Notice before actual payment of *all* the purchase money, although it be secured, and the conveyance actually executed, is equivalent to notice before the contract, and one having such notice can not claim the rights of an innocent purchaser without notice. *Ibid.*

4. *Quære*: Whether the purchaser is, in such case, entitled to hold the land as an indemnity for what he has paid before

notice, and if so, under what circumstances? *Ibid.*

5. Where a grain rent is reserved in a lease, with a condition that the lessor shall hold the crop as security for the rent, the lien attempted to be reserved for the rent would be inoperative as to a purchaser in good faith, without notice, but would be good against a naked wrong doer, who would have no claim but possession, derived through the wrongful act.—*Fowler et al. v. Hawkins*, 211

R.

RAILROAD.

See NEGLIGENCE, 1, 2, 3. CORPORATION, 1, 2.

Proceedings against, in aid of Execution. See STOCK, SUBSCRIPTION OF, 3.

1. Actions against railroad companies for injuries to animals, must, under the statute, be brought in the county where the injury was done, and in the absence of proof upon this subject, the jurisdiction of the Court over the subject matter of the case is not made to appear.—*The Indianapolis, &c. Railroad Co. v. Renner*, 135

2. Where a railroad company has securely fenced their road, except at certain places where the owner of the land is permitted to erect draw bars, or gates, for his own convenience in crossing said road, and by reason of the neglect of such land owner to maintain such bars or gates, his stock passes upon the railroad track and is killed, the company are not liable for the damages sustained.—*The Indianapolis, Pittsburg, &c. Railroad Co. v. Shimer*, 295

3. The tenant of the land owner, occupying the lands, and using the crossing, or way, would be subject to the same rule of decision. *Ibid.*

4. By our statute (1 R. S. 1852, p. 113) the stock of a railroad company in this State is to be assessed against the company, and not against the individual stockholder, and the term "stock," as used in the statute, includes not only stock subscriptions, but all the actual, tangible property of the company.—*The Michigan Central Railroad Co. v. Porter et al.*, 380

5. Where a foreign railroad corporation,

under a contract with a company chartered in this State, constructs, equips and operates a portion of the line of the latter company in this State, the stock in such road, so constructed, must be regarded as vested in the company under whose charter it was built, and can not be assessed against the foreign corporation for taxation; nor can the road bed, in such case, be assessed as real estate against the foreign corporation, and the rolling stock as personal property, since our statute requires it all to be assessed as corporation stock.

Ibid.

RECIEVER.

For Insolvent Corporations. See BANK, 6.

RECORD.

See ADJOURNED TERM, 1, 2, 3, 4. PRACTICE, 15. INDICTMENT, 2, 4.

Of Judgments Destroyed by Fire. See LIEN, 1, 2.

Of Deeds. See NOTICE, 1, 2, 3.

Of Common Council. See STREETS, 8, 16. PRINCIPAL AND AGENT, 2, 4, 7.

Of Court of Conciliation. See EVIDENCE, 21, 22, 23.

1. Where a cause is tried by a stranger, not by the legal and judicially recognized judge, the record must show the right of such stranger to act.—*Cooper v. Lingo*, 67

2. Where an amended complaint has been filed, the original complaint should not be included in a transcript of the record, on appeal.—*Downs et al. v. Downs*, 95

3. It appears from the record, that one A., judicially known to the Supreme Court to have been the judge of the Court below, began the term of the Court at which this case was tried, and made rulings in the case. Afterward, and before the day of the trial, the record showed that the Court was held by one B., "acting judge of said Court," but contained no record of the manner or purpose of his appointment as such. A motion for a new trial having been overruled, thirty days were given to prepare a bill of exceptions, which was prepared within the time limited, and signed by B., as judge. *Held*, that in the absence of evidence, or judicial knowledge of the right of B. to sign the

bill of exceptions, as judge, such right can not be presumed to exist.—*The Board of Commissioners, &c. v. Coats*, 150

4. It should appear from the record, or be within the judicial knowledge of the appellate Court, that the inferior tribunal before which a case was tried, had authority to act in the premises, either legally, or in fact; and as it does not appear so in this case, the whole proceedings were without law, and can not be maintained. *Ibid.*

5. Suit upon a promissory note. Answer: want of consideration, specially setting out the facts. The plaintiff moved to strike out the answer, as a false and sham pleading; and in support of his motion filed affidavits which tended to show the several matters alleged in the answer to be untrue; and the defendant having declined to affirm his belief as to the truth of his answer, or to give any evidence that the same was true, or that it was filed in good faith, the Court sustained the motion. *Held*, that neither the motion nor the affidavits made any part of the record, on appeal, there being no order of the Court or bill of exceptions making them such.—*Merritt v. Cobb*, 314

6. The record of the trial of a criminal charge upon indictment must show, on appeal, by a caption to the indictment, or other proper entry, that a grand jury was empaneled at the term at which the indictment was found, and that the grand jury returned the indictment into Court.—*Sawyer v. The State*, 435

7. A pleading stricken out on motion forms no part of the record unless made so by bill of exceptions.—*Oiler et al. v. Bodkey et al.*, 600

RECORDER.

Liability of Sureties on Bond of. See BOND, 1.

1. Suit by S., recorder of Wabash county, to recover for services in keeping up a general and double index of deeds, and another of mortgages, and indexing therein a certain number of deeds and mortgages, at fifteen cents per hundred words. *Held*, that § 3, of the act of February 14, 1855, (Acts 1855, p. 158,) must be construed to mean that the indexing of deeds and mortgages shall be considered a part of the service of recording them, and that

the fee for recording shall be deemed to include the indexing. — *The Board of Commissioners, &c. v. Sheets*, 22

2. The recording and indexing being one service, and included in one fee, it can not be said that the recorder is required to keep up the index without compensation; and hence, he can not recover for the indexing, under the act of March 2, 1855, (Acts 1855, p. 106,) as for services not provided for by law. *Ibid.*

REDEMPTION.

The act of June 4, 1861, (Acts. Spec. Sess. 1861, p. 79,) providing for the redemption of real property sold upon execution, &c., so far as the same was intended to apply to sales on judgments rendered upon contracts existing at and before its passage, is in conflict with Art. 1, § 10 of the Constitution of the *United States*, which prohibits the passage of any law impairing the obligation of contracts. — *Scobey v. Gibson*, 572

REFEREE.

See ARBITRATION, 1, 2, 6.

Where an order of reference does not require the referee to report to the Court the facts found by him, he has no authority to report them, and there is nothing before the Court upon which to base exceptions to the finding of the referee on the evidence. — *Royal v. Baer*, 332

REPLEVIN.

Deed may be Recovered in, before a Justice of the Peace. See DEED, 8.

1. It is not necessary that the answer of the defendant in replevin should claim a return of the property, but if the case made by the evidence, authorizes a return, it may be awarded by the Court, after verdict. — *Conner et al. v. Comstock et al.*, 90
2. A judgment of return can not be awarded, where the evidence fails to show that the property was delivered to the plaintiff in replevin, or, where there has been a failure to assess the value of the property. *Ibid.*
3. An action of replevin will not lie to recover the possession of goods from one

who has purchased them in good faith, of a wrong doer, without a previous demand by the true owner. *Ibid.*

4. Suit to recover the possession of personal property, alleged to have been wrongfully taken and unlawfully detained by the defendant. Answer: 1. Property in the defendant. 2. Property in a third person. 3. Denial. The jury returned a verdict as follows, viz., "We, the jury, find for the plaintiff; find the property in the horse to be in him, and that he is entitled to the possession, &c. We also find the value of the horse to be \$125." *Held*, that the verdict sufficiently covered all the issues of the case. — *Clark v. Hark*, 281
5. The defendant asked the Court to instruct the jury as follows: That to enable the plaintiff to recover, the jury should be satisfied from the evidence that he has a general or special property in the horse in controversy, and a right to his immediate possession, and that the evidence proves either an unlawful taking, or an unlawful detention of the horse by the defendant. *Held*, that the instruction was strictly correct, and should have been given. *Ibid.*
6. *A.* having a mare in the possession of *B.*, which *C.* desired to purchase, agreed to sell her to *C.* for \$70, if he would give his note therefor, payable at a given time, with such surety thereon as *B.* would approve. *C.* offered to *B.* a note with surety, but which did not bear interest, nor waive the benefit of the valuation laws. Upon objection being made to these defects, *C.* took a pen and wrote in the note the words, "with interest," and then agreed that he would take the mare, and if *A.* was not satisfied with the note, when he should see it, he would return the mare to him. *A.* declined to receive the note, and having demanded of *C.* to return the mare, brought this suit to recover her. *Held*, that the alteration of the note by the insertion of the words, "with interest," without the consent of the surety, discharged him from any liability thereon, and left the note without surety, and hence not such a one as the contract called for. — *Kountz v. Hart*, 329
7. The title to the mare never passed to *C.* *Ibid.*

REPRESENTATIONS.

Fraudulent. See FRAUD, 1, 2, 4, 5.

Matters of Opinion and Expectation are not.
See STOCK, SUBSCRIPTION OF, 3.

RESCISSION.

See CONTRACT, 25, 26.

A person entitled to rescind a contract on the ground of fraud, must restore to the other party what has been received, so as to place him in *statu quo*.—*Shepherd et al. v. Fisher et al.*, 229

REVIEW.

Of Administrator's Sales. See EXECUTORS AND ADMINISTRATORS, 5, 6, 7.

Of Referee's Report. See ARBITRATION, 1.

In the year 1858, *A.*'s administrator instituted a suit against *B.*, then in life, upon five promissory notes. Pending the suit *B.* died, and the same was revived against his administrators, and judgment taken against them for the amount of the principal and interest of the notes. The administrators of *B.* having resigned, administrators *de bonis non* were appointed, who instituted proceedings to review the judgment, alleging that there existed a valid defense to the notes to the amount of \$300; that they had found among the papers of their intestate a receipt for that amount, as a credit on said note, which had not been allowed in taking said judgment; that the said receipt was discovered since the judgment, and since the last term of the Court, and was previously unknown to the plaintiffs. In another paragraph, it was alleged that there was error of law in taking the judgment, in this, that judgment was entered for a larger amount than was claimed in the plaintiff's complaint. On the trial, it was shown that *B.* had appeared to the suit on the notes, in his lifetime, but had pleaded no defense under which the receipt in question could have been given in evidence. On the hearing, the Court ordered a sum equal to the excess of the judgment above the amount demanded in the complaint to be credited thereon, as of the date of the judgment, and found against the plaintiffs as to the credit of \$300 claimed. *Held*, that as there was no

evidence tending to show that the receipt had ever been lost or mislaid, it must be inferred that by reasonable diligence it might have been discovered, and the absence of such proof, together with the fact that *B.*, in his lifetime, made no such defense, justified the finding of the Court.—*Alsop et al., Administrators of Very v. Wiley, Administrator of Taylor*, 452

S.

SET-OFF.

Against City. See STREETS, 1.

A set-off may be pleaded to an action by an administrator.—*Schoonover, Administrator of Strain v. Quick*, 196

SHERIFF'S SALES.

See MORTGAGE, 5, 6.

1. If a judgment be satisfied, the power to sell under it ceases; and should a sale take place in virtue of an execution upon such satisfied judgment, even a *bona fide* purchaser without notice would acquire no title.—*Lavel et al. v. Rowley*, 36
2. Under § 466 of the code, it is the duty of the sheriff to determine, in a proper case, the question of the divisibility of real estate offered by him for sale; and in serving an execution upon a judgment, if the land consists of two or more lots, tracts or parcels, susceptible of division, he must sell in parcels, and no more than enough to make the debt and costs.—*Benton et al. v. Wood*, 260
3. No formal levy of a certified copy of a judgment of sale in a foreclosure suit is necessary, because the judgment itself designates the particular property to be sold.—*Evring v. Hatfield et al.*, 513
4. An offer to sell would be a commencement of the execution of the judgment, and where execution has been commenced before, it may be completed after, the return day. *Ibid.*
5. The issuing of a subsequent void writ, while the original valid one is still in the hands of the officer, would not vitiate action under the original. *Ibid.*

SLANDER.

Arbitration of. See PRACTICE, 39.

1. The word "screwed" does not of itself import sexual intercourse, but it may, in certain localities, be used to impute the charge of whoredom, and where that is the case, a complaint for slander founded upon such a use of the word should affirmatively allege its import at the time and place it is used.—*Miles v. Vanhorn*, 245
2. The following words, spoken of an unmarried female, are slanderous, viz., "She is in the family way, and I can prove by A., that she has been taking camphor and opium pills to produce an abortion." *Ibid.*
3. After the jury has been sworn, and a portion of the evidence heard, in an action for slander, it is too late for the plaintiff to amend by inserting an entire new set of words, essentially different from those previously alleged, and of themselves constituting a new cause of action. *Ibid.*
4. Where, in an action for slander, the defendant, under a plea of justification, has proved facts and circumstances tending to show the truth of the charge uttered, but has not attempted to impeach the general character of the plaintiff, it is not competent for the plaintiff to introduce evidence of good character. *Ibid.*
5. Suit by A. against B. for slander. The complaint averred that before the time of speaking the slanderous words, a sum of money had been stolen from one C., and that B. spoke of, and concerning the plaintiff, these false and slanderous words, viz., "He is the man that took the money, I know it." A witness for the plaintiff having testified to the speaking of the words, was then asked, "what did B. mean by the language he made use of?" to which the witness answered, "he meant, I suppose, that A. was the man who stole the money." Held, that as there was no averment that any of the words used had a local or provincial meaning, the jury should have been left to judge, from the speaking of the words, and the attending circumstances, of the meaning intended to be conveyed by the use of them; but as the circumstances attending the speaking of the words showed that they referred to the larceny, the defendant was

not harmed by admitting the evidence.—*Justice v. Kirlin*, 588

6. Where a witness is inquired of as to the state of feeling existing between the parties to an action of slander, with a view to establish malice, the question should be directed to the time of speaking the slanderous words. *Ibid.*
7. As words spoken by an influential person would have a greater tendency to make a fixed impression than if spoken by one without influence, it is competent for the plaintiff to prove, in an action of slander, that the defendant was a person of influence in the community. *Ibid.*
8. After the defendant had, upon a plea of justification, been permitted to prove by a witness in whose possession one of the stolen bills was found, that he got it of the plaintiff, and that he had taken it back on request, it was competent for the plaintiff to prove that the witness, when first inquired of as to where he got the bill, had answered that he had got it of another person than the plaintiff. *Ibid.*

SPECIFIC PERFORMANCE.

1. The doctrine that a specific performance will be decreed where the party is able at the rendition of the decree to perfect title, only applies to cases where some secret defect is discovered in the title, previously unknown, perhaps, to either party, and does not operate to excuse a party from doing all in his power to fulfill his contract.—*Cook v. Bean, Administrator of Burbridge*, 504
2. A. and B. entered into an agreement, in writing, by which A. agreed to sell and convey to B. a certain town lot, in consideration that B. would convey to him eighty acres of land in Jasper county. The land was to be selected as follows, viz., B. was to furnish to A. five hundred acres of land in said county, from which A. was to select an eighty acre tract; and when so selected, and a deed made for the same, then A. was to convey to B. the town lot, and give him possession at a given time. Suit by B. for a specific performance of the agreement, alleging that he had said five hundred acres of land, and furnished a description thereof to A., and requested him to make a

selection therefrom, which he failed and refused to do, and by reason of such refusal he could not make and tender a deed, &c. *Held*, that an application for a specific performance is addressed to the sound legal discretion of the Court, and as *B.* had not tendered a conveyance for any particular tract, and did not make any averment as to the value of the lands, or give any description of the lands furnished to *A.*, from which to choose, a case was not made in which the Court could determine whether a specific performance could, or not, be equitably decreed.—
Kirkman v. Kenyon et al., 607

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STATUTES CONSTRUED.

See WILL, 8.

Adjourned Term. See ADJOURNED TERM, 1, 2, 3.

1. The word "holding," as used in § 1 of our statute concerning the partition of lands, (2 R. S., p. 329,) does not require actual occupancy, but is equivalent to "owning" or "having title to" lands.—*Godfrey v. Godfrey et al.*, 6
2. Suit by S., recorder of *Wabash* county, to recover for services in keeping up a general and double index of deeds, and another of mortgages, and indexing therein a certain number of deeds and mortgages, at fifteen cents per hundred words. *Held*, that § 3, of the act of February 14, 1855, (Acts 1855, p. 158,) must be construed to mean that the indexing of deeds and mortgages shall be considered a part of the service of recording them, and that the fee for recording shall be deemed to include the indexing.—*The Board of Commissioners, &c. v. Sheets*, 22
3. The recording and indexing being one service, and included in one fee, it can not be said that the recorder is required to keep up the index without compensation; and hence, he can not recover for the indexing, under the act of March 2, 1855, (Acts 1855, p. 106,) as for services not provided for by law. *Ibid*.
4. The charter of the *City of Madison* (Local Laws, 1848, p. 89,) provides for the election of an assessor on the first *Monday* in *April*, and requires him forthwith, after his election, to make out the tax list of persons and property, and to complete the same by the first of *July* following, and that time shall not be allowed for that

purpose beyond *September* first, following. The collector is, however, authorized, while engaged in collecting the taxes, to list persons and property which the assessor failed, or omitted, to list. The charter also authorizes a tax upon bank stocks. *Held*, that under these provisions of the charter, persons, or property, becoming taxable after the first of *September*, as bank stock created after that time, could not be listed for taxation, since the assessor can not be said to have failed or omitted to list, that which did not exist as a subject of taxation.—*King v. The City of Madison*, 48

5. The provision of the city charter which authorizes a tax upon bank stocks, is controlled, as to the stock of the Bank of the State of *Indiana*, by the charter of that bank, which in express terms exempts such stock from taxation for municipal purposes; and this exemption relates to all legal modes of taxation. *Ibid*.
6. *Quære*: Whether § 428, 2 R. S. 1852, p. 176, which provides that at the expiration of the stay, it shall be the duty of the clerk to issue a joint execution against the property of all the judgment debtors, and the replevin bail, should not be construed to be directory as to the manner of the execution, rather than a direction to issue upon the expiration of the stay.—*Lewis et al. v. Phillips*, 108
7. A. and B. filed their claim before the *Board of County Commissioners*, for work done in the erection of two stone piers for a bridge. A contract was given in evidence, which, in the introductory part of it, purported to be made between A. and B., of the first part, and "P., agent of the counties of S. and W.," of the other part. After describing the work to be done, &c., the contract provided that the said P. should pay the stipulated price in county orders, &c. *Held*, that as the agreement bound P., and not the counties for which he assumed to be acting, to pay for the work, an action could not be maintained upon it against the counties, without the averment of other facts; as that the contract was accepted and adopted by the counties as theirs.—*The Board of Commissioners, &c. v. Butterworth et al.*, 129
8. The failure of the board to have made the preliminary surveys, &c., required by

- the act of 1855, (Acts 1855, pp. 18, 19,) before letting the contract for the bridge, did not render their acts void, or affect their liability to pay for the work. *Ibid.*
9. Suit to recover certain real estate, which the plaintiff had been induced to subscribe to the stock of the company, through the false and fraudulent representations of her agent. The complaint averred that the plaintiff was ready and willing, and offers to bring said stock into Court, to be disposed of in such manner as the Court may direct. The Court below, on motion of the defendant, ordered the plaintiff to furnish the defendant with inspection of the certificates of stock by him subscribed, the motion being founded on the pleadings alone, and there being no evidence of notice to the plaintiff to produce. For the failure of the plaintiff to comply with this order, the cause was dismissed, without prejudice. *Held*, that §§ 305 and 306 of the code (2 R. S., p. 97), relate to papers which the adversary party desires to use in evidence, and not to papers of which a mere inspection is demanded, and which are set forth or referred to in the pleadings.—*Silvers v. The Junction Railroad Co.*, 142
 10. At common law the rule is, that where the form of action, or the pleadings, gives the party notice to be prepared to produce a written instrument, no other notice to produce it is necessary; and §§ 305 and 306, *supra*, were not intended to change this rule. *Ibid.*
 11. Sections 305 and 306, *supra*, construed with § 363 (2 R. S., p. 120), authorize the Court, for disobedience of an order to produce papers, either to "allow parol evidence to be given of their contents," or "to exclude the evidence, and punish the party refusing," or, to dismiss the suit without prejudice. *Ibid.*
 12. On December 28, 1857, A. recovered two judgments against B., before a justice of the peace, for the sum of \$200 each, and immediately thereafter filed in the clerk's office of the proper county, certified transcripts of the said judgments. On January 5, 1858, C. purchased of B. a tract of land in said county, and paid him the purchase money in full. Afterward, on January 29, 1859, the transcripts, together with the order book in which they were recorded, were destroyed by fire, and on March 26, 1859, the justice again made out transcripts, which were filed, and executions issued thereon were levied on the real estate purchased by C. Suit to enjoin the sale. *Held*, that the judgments, upon the filing of the first transcripts, became liens on the land, but those transcripts, and the records thereof, having been destroyed, no executions could issue thereon until they were reinstated, in the mode pointed out by 2 R. S., § 20, p. 510.—*Sheldon et al. v. Arnold*, 166
 13. A. died intestate, and without issue, leaving his widow, and his father and mother, surviving. His estate consisted of \$334 of personal property, and real estate valued at \$1,800, which had been conveyed to him by his father in consideration of natural love and affection. Two thirds of the land was sold on petition of the administratrix, to pay debts, leaving one third to the widow; and the surplus after the payment of debts, and \$300 to the widow, was, by order of the Court, distributed, one fourth to the father and mother, and three fourths to the widow. *Held*, that under § 7, of the act regulating the apportionment of estates, &c., (1 R. S., p. 249,) the father was entitled to the reversion of the land, subject to the rights of the widow therein; which means her ordinary right to one third of the real estate left by her deceased husband.—*Mitchell et al. v. Parkhurst, Administratrix of Mitchell*, 146
 14. The overplus remaining after the payment of debts, being of the proceeds of the sale of the land, belonged to the father, because, in the absence of such a sale, he would have been entitled to the entire two thirds, as a reversioner in fee simple. *Ibid.*
 15. Section 15 of the act fixing the times of holding the Courts of Common Pleas, (Acts 1859, p. 84,) authorized a Court to be held in Tippecanoe county, in December, 1860, the law having gone into force in October of that year; and did not require that the Courts should begin, under that law, in the order of the months named, viz., March, June and December.—*Phillips et al. v. Stewart*, 154
 16. Where, in an action to recover the possession of real estate, the defendant appears and pleads to the action, his possession of the land, described in the

- complaint is admitted, under § 597, 2 R. S., p. 167, and hence evidence of the boundaries of the land is irrelevant.—*Voltz v. Newbert et al.*, 187
17. The act of 1855 (Acts 1855, p. 57) amending § 596, 2 R. S., p. 167, was not intended to change this rule, or increase the amount of evidence, but only to change the mode of pleading. *Ibid.*
18. Suit by an assignee upon a promissory note. Answer: that the payee of the note had notified defendant, that the alleged assignment to the plaintiff was not valid, and that he must not pay, &c., and asking that the payee be made a party. *Held*, that under 2 R. S., § 23, p. 32, the application to have the payee made a party should have been made upon affidavit, before answer.—*Smallhouse et al. v. Thompson et al.*, 204
19. Section 522 of the code, which authorizes a proceeding against persons who may have property of the debtor in their hands, or who may be indebted to him, contemplates that the execution defendant is to be made a party with such other persons.—*Chandler et al. v. Caldwell*, 256
20. Under § 466 of the code, it is the duty of the sheriff to determine, in a proper case, the question of the divisibility of real estate offered by him for sale; and in serving an execution upon a judgment, if the land consists of two or more lots, tracts or parcels, susceptible of division, he must sell in parcels, and no more than enough to make the debt and costs.—*Benton et al. v. Wood*, 260
21. Section 382 of the code applies, alone, to demurrers overruled.—*Jay et al. v. The Indianapolis, Pittsburgh, &c. Railroad Co.*, 262
22. Street improvements must, under the act of 1857, (Acts 1857, p. 63,) be executed under a contract with the city council; and such contract must be evidenced either by a formal instrument in writing, signed by the parties or their agents, or a written proposition from the contractor, containing all the particulars of a contract, which must be accepted by the council.—*The City of Logansport v. Blakemore*, 318
23. Suit upon a promissory note for \$104.50 Answer: 1. Payment. 2. A counter claim to the amount of \$15. The Court found for the defendant, on his counter claim, and also that he was entitled to a credit of \$30, paid before suit, and another credit of a like amount, paid after the commencement of the suit, leaving due to the plaintiff, \$33.07, for which he had judgment. Motion by the defendant to tax the costs against the plaintiff. *Held*, that the plaintiff's claim having been reduced below \$50 by proof of payments, the motion should have been sustained, the statute, (2 R. S., § 397, p. 126,) not making any distinction between payments made before and after suit.—*Wathen et al. v. Fare*, 320
24. Section 24 of the act for the relief of the poor, (1 R. S. 1852, p. 405,) authorizes relief to be granted to persons, not inhabitants of the township, who may be found lying sick therein, or in distress, without friends or money, and renders the county liable therefor.—*The Board of Commissioners of Jefferson County v. Rogers*, 341
25. Section 8 of the act to limit allowances, &c., (1 R. S. 1852, p. 101,) which provides for the employment by the county board of one or more physicians to attend upon the poor, has reference only to such poor as are settled in the county, and does not include strangers entitled to temporary relief; and hence the overseer of the poor may employ another physician to attend upon such strangers, and the county will be liable therefor. *Ibid.*
26. By our statute (1 R. S. 1852, p. 113) the stock of a railroad company in this State is to be assessed against the company, and not against the individual stockholder, and the term "stock," as used in the statute, includes not only stock subscriptions, but all the actual, tangible property of the company.—*The Michigan Central Railroad Co. v. Porter et al.*, 390
27. An indictment or information, under § 11 of the act of March 5, 1859, (Acts 1859, p. 202,) for selling or giving away liquor to a minor, need not state the kind of liquor sold or given away, but must aver it to have been an "intoxicating liquor;" and on the trial it must appear that the liquor was within the definition of the terms, "intoxicating liquor," given in § 2 of the act.—*Simpson v. The State*, 444
28. The summary remedy furnished by § 12, 2 R. S. 1852, p. 492, for recovering

- the possession of land, before justices of the peace, was only intended to be given in cases where there has been an unlawful and forcible entry, or where the entry has been peaceable, but the detention is unlawful and forcible. The word "or," in the first line of the section, being evidently used in the sense of "and."—*O'Connell v. Gillespie*, 459
29. The act of March, 1859, fixing the time and mode of electing a State printer, &c., (Acts 1859, p. 143,) was intended to fix the prices to be paid for the public printing thereafter to be done, whether by the State printer then in office, or by those to be elected under the provisions of that act; and the title of the act was sufficient to authorize such legislation under it.—*Walker v. Dunham, Secretary of State*, 483
30. The act is not obnoxious to the objection that it contains more than one subject, and matters properly connected therewith, as the Legislature may well, in one act, define the duties and fix the compensation of an officer, and provide for the future filling of the office. *Ibid.*
31. The State printer is an officer, and the compensation and duties of an officer may be increased or diminished, in the absence of constitutional restrictions, at the pleasure of the Legislature. *Ibid.*
32. Section 90 of the act to revise the rules and practice in criminal cases, (2 R. S. 1852, p. 372,) which provides that "all persons who are competent to testify in civil actions," shall also be competent witnesses in criminal cases, was intended to adopt the law as it then stood, upon the subject of the competency of witnesses in civil actions; and hence the law of 1861, (Acts 1861, p. 51,) admitting parties to testify in civil actions, does not apply to criminal cases.—*Hoagland v. The State*, 488
33. The liquor law of 1859 does not give an appeal from the judgment of a justice in a prosecution for a violation of that law, and as the general statute on the subject of appeals from justices in criminal cases only gives an appeal to the Common Pleas, no appeal will lie to the Circuit Court from the judgment of a justice for a violation of the liquor law.—*Dearth v. The State*, 523
34. Section 21 of the general election law (1 R. S. 1852, p. 263) was intended to, and does, preclude the election board from taking testimony relative to the right of any person to vote, who may offer to take the oath therein prescribed.—*The State v. Robb*, 536
35. The word "contract," as used in § 23 of the act to authorize and regulate the business of general banking, (Acts 1855, p. 39,) which provides that "contracts made by such association and all bills," &c., "shall be signed by the president or vice-president, and cashier thereof," is employed in a limited, and not in its broad sense; and does not include a contract of indorsement of a note, which may, according to the usage of banks, be made by the cashier alone.—*Jones v. Hawkins*, 550
36. The first section of the act regulating general elections, &c., (1 R. S. 1852, p. 260,) which provides that existing vacancies in office shall be filled at the annual general election, is so limited by the second section of said act, which prescribes the notice to be given of a general election, that an election to fill a vacancy can not legally be held where the vacancy did not occur long enough before the day of election to enable the steps required by the statute, as to notice, &c., to be taken.—*Beal v. Ray et al.*, 554
37. Section 18 of the free bank law of 1855, (Acts 1855, p. 23,) which requires that the place where a bank is located, if not a county seat, shall contain not less than one thousand inhabitants, is probably merely directory, but if not, the defendant was not, in this case, in a position to make such a defense.—*Allison, President of the Bank of Gosport v. Hubbell*, 559
38. While it is the province and duty of the Court to construe statutes and interpret the language employed by the law makers, yet the object to be arrived at is the intention of such law makers; which must be derived, if possible, from the act itself, or, from that when considered in connection with other statutes upon the same subject; or, from those things together with cotemporaneous construction of, or usage under, said statute. *Ibid.*
39. In carrying on the ordinary, or daily, business of banking under said free banking

law, such as drawing, indorsing, and accepting bills of exchange, giving certificates of deposit, &c., either the president or cashier is authorized to bind the institution, in the absence of any specified manner of transacting said business in the articles of association. *Ibid.*

40. A Circuit judge having been of counsel in a cause pending in his Court, set the same for trial before a judge of the Supreme Court, who appeared at the time designated, being in regular term time, heard some arguments and made some orders therein as to making new parties, &c. The Supreme judge not having appeared further in said cause, the same was again set for trial by the judge of the Circuit Court, before a judge of another circuit. This was done by agreement of the parties, entered of record. The cause was accordingly heard before the judge last designated, who, after repeated adjournments, from time to time, and not within any regular term of said Court, decided the same, and rendered judgment for plaintiff, over a motion for a new trial by defendants. *Held*, that the judgment thus rendered was valid and binding; that said judge last designated had full power under the act of March 1, 1855, (Acts 1855, p. 61,) to adjourn the hearing of said cause, from time to time, although some of said adjournments might have been to a day beyond a regular term of said Court.—*Cincinnati and Chicago Railroad Co. et al. v. Rowe et al.*, 568

41. All corporations organized under the provisions of the act of June 15, 1852, establishing general provisions respecting corporations, (1 R. S. 1852, p. 239,) are considered as in being for three years after they shall have ceased, legally, to exist, for the purpose of their organization, in order that the affairs of such corporation may be properly closed up, if necessary, by suits to be conducted in the name of the defunct body.—*Herron, Receiver of the Savings Bank of Indiana v. Vance et al.*, 595

42. As corporations might be organized under the act of June 15, 1852, *supra*, of such a character as to fall within the class of "moneyed corporations," as intended by § 28 of the act to regulate the business of general banking, (1 R. S. 1852, p. 159,) it appears to follow that so far as proceed-

ings to dissolve corporations for banking purposes, and the appointment and duties of a receiver are governed at all by special statute, the act establishing general provisions respecting corporations, (1 R. S. 1852, p. 239,) should maintain. *Ibid.*

43. *Quare*: Whether, in view of these statutes, any averments could be made in a complaint showing authority to prosecute or defend suits within three years, in the name of a receiver, or in any name other than that of the corporation. *Ibid.*

STATUTE OF FRAUDS.

See FRAUDS, STATUTE OF, 1, 2.

1. At common law, even where the statute of frauds required a contract to be in writing, and it actually was so, it was not necessary that a copy of the writing should be made a part of the declaration, nor that it should even be averred that the contract was in writing.—*Booker et al v. Ray*, 522
2. The averment of a pleading may be made certain by reference to diagrams filed with, and made part of the pleading. *Ibid.*

STOCK, SUBSCRIPTION OF.

Liability of Stockholders. See BANK, 7.

1. *A.* having made a cash subscription of \$3,000 to the stock of the railway company, was induced by an agent of the company to make a further subscription of a certain farm owned by him, upon the promise that his cash subscription should not be demanded until the road was completed. The company, not regarding their obligation to forbear, commenced suit on the cash subscription, and were proceeding to enforce the collection of a judgment recovered thereon. Suit by *A.* to recover the land, averring a tender of the stock taken for the land. *Held*, that the contract to forbear, being founded upon a valid consideration, might perhaps have been set up in defense of the action upon the cash subscription, and would certainly have furnished good ground for enjoining its collection until the completion of the road; but no such defense having been made, *A.* was not entitled to a rescission of the land subscription.—*Scarce v. The Indiana and Illinois Central Railway Co.*, 193

2. The company, having broken her contract, was liable for damages, and the complaint was sufficient to authorize their recovery. *Ibid.*
3. Proceedings in aid of execution against a railroad company. *A.*, who was alleged to be indebted to the company on a subscription of stock, was made a defendant to answer as to such indebtedness, and appeared and answered that his said subscription was procured by false and fraudulent representations, on the part of the agents of said company, in this, to wit: that said agents represented that the company had already sufficient stock subscribed to complete said road within eighteen months, and only desired subscriptions from the defendant, and others along the line of said road, as an evidence of their friendly disposition to the road; that defendant, relying on the truth of said representations, and believing the same to be true, and that said road would soon be completed, and the value of his land be thereby largely increased, made said subscription; that, in fact, said company had not sufficient means to procure and clear the track for said road, and that said road had been abandoned, &c. *Held*, that the facts stated in the answer were not sufficient to release the defendant from liability on his subscription, the alleged misrepresentations being of matters of mere opinion and expectation, and not of any existing fact.—*Bish v. Bradford*, 490
4. The consideration of the subscription was the shares of stock to which the subscriber became entitled, and not those incidental advantages which he might have anticipated from a completion of the road. *Ibid.*
5. The fact that the road had been abandoned, furnished no defense, as the creditors of a corporation have a right to pursue its stockholders, even after its corporate existence has ceased. *Ibid.*
6. Suit by a railroad company upon a promissory note. Answer: that on March 14, 1855, defendant subscribed for twenty shares of the stock of said company, of \$50 each, upon the express condition that the final location of the road should cross *White* river, near *Martinsville*, and run within one mile of *Gaspport*, and continue down on the west side of said river to the town of *Spencer*, and that before the bringing of this suit, said company had finally

located said road on the east side of said river; that said promissory note was given in consideration of said subscription, &c. Reply: that the said road had been located, in pursuance of the condition of said subscription, on the west side of *White* river, &c. The note was dated September 25, 1856. *Held*, that the condition of the subscription was waived by the giving of the note.—*The Evansville, Indianapolis, &c. Railroad Co. v. Dunn*, 603

STREETS.

1. In the year 1854, the *City of Jeffersonville*, acting under the general law of 1852 for the incorporation of cities, contracted with one *C.*, to grade and gravel a street in said city. The work was performed by the contractor, and in the year 1860, a suit was brought in the name of the city, to recover an assessment against one of the property holders for said work. *Held*, that the city was a mere nominal party, the contractor being the party beneficially interested, and hence a set-off against the city could not be allowed.—*Flournoy et al. v. The City of Jeffersonville*, 169
2. The suit could not be maintained, as the remedy for the collection of street assessments had been changed by the act of 1857, which was re-enacted in 1859, and is still the law. *Ibid.*
3. The bringing of this action, though erroneous in form, will, under 2 R. S., § 218, p. 77, save the claim of the plaintiff from the bar of the statute of limitations. *Ibid.*
4. The remedy now given for the collection of assessments for the grading and graveling of streets, viz., by precept issued by the mayor and clerk, under the direction of the council, is constitutional. *Ibid.*
5. The issuing of the precept is a ministerial act, and may be performed by any person upon whom the law may cast the duty; the judicial determination of the case is had upon appeal. *Ibid.*
6. By the general law for the incorporation of cities, the council has jurisdiction over the streets and alleys, with power to provide for their improvement: 1. Upon the petition of the property holders, according to § 66, by a majority vote. 2. By a two thirds vote of the council, without a petition.—*The City of Indianapolis v. Imberry*, 175

7. The order of the common council for the improvement of a street, need not be expressed in an ordinance, but may be made by motion, or resolution. *Ibid.*
8. It is not necessary, in order to render the contract valid, that the council should enter of record its determination, under § 68, whether the improvement contracted for, should be paid for by the property holders, or out of the general fund of the city; but where the council determines to pay out of the general fund, such an order should be made of record. *Ibid.*
9. The bids for the work must be reported to the council, and that body must award the contract upon one of them; which contract must be in writing, and be filed with the proper officer. *Ibid.*
10. The estimates of the amount due the contractor, must be made by the civil engineer of the city, and reported to the council, and that body must order the payment of the estimate, which then becomes an assessment, before the contractor can proceed, by precept, against the property holders. *Ibid.*
11. On an appeal from a precept, the property holder may have a trial upon the merits, except as to irregularities prior to the making of the contract, which are waived, unless taken advantage of by an injunction suit, before the work is performed. *Ibid.*
12. Section 59 of the general law for the incorporation of cities (Acts 1857, p. 61,) confers upon the common council ample power to change the grade of a street, as well as to make any other alteration therein. And this power is continuing, to be exercised from time to time, as the wants of the city may demand; of which necessity the council is made the judge.—*Macy et al. v. The City of Indianapolis et al.*, 267
13. In the absence of any legal provision authorizing it, consequential damages, resulting from a change in the grade of a street can not be recovered by the property holders against the city. *Ibid.*
14. Such consequential injury does not come within that clause of the Constitution which prohibits the taking of private property for the public use, without compensation first assessed and tendered. *Ibid.*
15. Street improvements must, under the act of 1857, (Acts 1857, p. 63,) be executed under a contract with the city council; and such contract must be evidenced either by a formal instrument in writing, signed by the parties or their agents, or a written proposition from the contractor, containing all the particulars of a contract, which must be accepted by the council.—*The City of Logansport v. Blakemore*, 318
16. A transcript of the proceedings of the city council in a matter of a street improvement, must contain a copy of the contract, or a *prima facie* liability will not be shown against the property holder. *Ibid.*

SUMMONS.

See Warr, 1.

The christian name of the plaintiff was erroneously stated in the summons, but in the complaint was correct. On the return of the summons, the plaintiff had leave to amend it by the complaint. *Held*, that there was no error in permitting the amendment.—*Haines et al. v. Bottorff*, 348

SURETY.

Released by Alteration of Note. See REPLEVIN, 6.

For an Agent. See PRINCIPAL AND AGENT, 2, 3, 5, 7.

1. Where a judgment is joint against two defendants, both are regarded as principals, unless by proof, *aliunde*, one of them is shown to be surety for the other; and when one of such defendants, claiming to be surety for the other, pays off the judgment, without any judicial determination of the question of his suretyship, he can not have execution for his use on the judgment.—*Laval et al. v. Rowley*, 36
2. Ordinarily, a surety is liable to the creditor in the same manner, and to the same extent, as the principal debtor; but the surety may set up in defense any matter which ought, in equity, to go to his personal exoneration.—*Campbell v. Gates*, 126
3. There is no valid reason why the engagement of a surety may not be founded upon a consideration variant from that which induced his principal to execute

the agreement; and if such consideration be a condition subsequent, to be performed by the creditor, his failure to perform it would operate as a fraud upon the surety, and release him from all liability upon his engagement. *Ibid.*

4. It is plainly competent for the surety to set up and prove such failure of consideration, because such defense is not in conflict with the legal effect of the contract. *Ibid.*

5. It is only by virtue of our statute, that a surety may give notice to the creditor to sue, and secure his release if suit is not brought. No such doctrine was recognized in this State as a part of the common law, and under the statute the notice must be in writing.—*Halstead v. Brown*, 202

6. The giving of time by the creditor to the principal debtor will discharge a surety only when the agreement was upon a valid consideration; and a promise to pay illegal interest, or the paying up of interest already due, is not such a consideration. *Ibid.*

7. *A.* and *B.* entered into a contract by which the former agreed to purchase and deliver to the latter one thousand sheep. The contract was reduced to writing, and was signed by *A.*, and by two other persons as sureties for him, but was not signed by *B.* Suit by *B.* against *A.* and his sureties, alleging a failure to deliver the sheep. Answer, by the sureties: 1. That they executed the agreement upon the consideration that *B.* should also execute the same on his part, and that he neither signed the agreement, nor paid the money agreed to be advanced thereon. 2. That *B.* did not notify them of the acceptance of their guaranty, nor that he had given credit thereon. *Held*, that the recital in the agreement of the payment of one thousand dollars by *B.*, as part of the consideration of the contract, was not conclusive, but that the fact of the payment might be inquired into.—*Schope et al. v. Forney*, 385

8. If the sureties executed the agreement upon the consideration that *B.* should also execute it, and thus become mutually bound with *A.* for the performance of its conditions, they had a right to insist upon its execution by him, or to claim the benefit of his failure. *Ibid.*

9. The pleadings did not make a case in which notice to the sureties of the acceptance of the security was necessary. *Ibid.*

10. Judgment against *A.* and *B.* upon a promissory note. *B.* having established that he was a surety for *A.*, an order was entered that the execution to be issued on the judgment should first be levied of the property of *A.* The sheriff having levied the execution upon property of *A.*, took from him a delivery bond, with surety, which was afterward forfeited for a non-delivery of the property, and *A.* having no other property, the execution was then levied on the property of *B.* *Held*, that the statute does not require the judgment plaintiff to pursue collateral remedies, before resorting to the property of the surety; and hence, the property of *B.* was subject to seizure.—*Brown v. Brown et al.*, 475

T.

TAXES.

Railroads, How Assessed. See RAILROAD, 4, 5.

1. The charter of the *City of Madison* (Local Laws, 1848, p. 89,) provides for the election of an assessor on the first *Monday* in *April*, and requires him forthwith, after his election, to make out the tax list of persons and property, and to complete the same by the first of *July* following, and that time shall not be allowed for that purpose beyond *September* first, following. The collector is, however, authorized, while engaged in collecting the taxes, to list persons and property which the assessor failed, or omitted, to list. The charter also authorizes a tax upon bank stocks. *Held*, that under these provisions of the charter, persons, or property, becoming taxable after the first of *September*, as bank stock created after that time, could not be listed for taxation, since the assessor can not be said to have failed or omitted to list, that which did not then exist as a subject of taxation.—*King v. The City of Madison*. 48

2. The provision of the city charter which authorizes a tax upon bank stocks, is controlled, as to the stock of the Bank of the State of *Indiana*, by the charter of that bank, which in express terms exempts such stock from taxation for municipal

purposes; and this exemption relates to all the legal modes of taxation. *Ibid.*

3. An illegal tax, voluntarily paid, can not be recovered back; and the payment is regarded as voluntary, unless it be made to the officer to procure the release of person or property from his power; and protest at the time of payment, in connection with other circumstances, may be evidence that the payment was made for such a purpose.—*Jenks v. Lima Township*, 326
4. Where an illegal tax has been voluntarily paid by the tax payer, under a mistake of law, it can not be recovered back.—*Martin v. Stanfield*, 336

TAX SALE.

Where real estate is sold for taxes, when the owner has personal property in the county subject to sale, which is not sought for by the officer, the purchaser derives no title.—*Catterlin v. Douglass*, 213

TENDER.

Of Deed. See DEED, 6, 10, 11. SPECIFIC PERFORMANCE, 2.

TIME.

The month of *February*, commercially speaking, never has more than twenty-eight days.—*Kohler v. Montgomery*, 220

TITLE BOND.

1. Where real estate is sold by title bond, the purchaser is not, in the absence of a stipulation to that effect, entitled to the possession of the land before the time for making the conveyance, and though he may have entered into possession with the consent of the vendor, the latter may renew his possession at any time, on demand.—*Kratemayer v. Brink*, 509
2. When the vendee of real estate enters into possession under the contract of purchase, with the consent of the vendor, such entry does not constitute him a tenant. *Ibid.*
3. A reply averring a demand of possession after entry, and before suit brought, is sufficiently certain, on demurrer. *Ibid.*

TITLE.

See SHERIFF'S SALES, 1.

Failure of, to Real Estate. See DAMAGES, 5, 6, 7, 8, 9.

Tax. See TAX SALES, 1.

Deed, Replevin will lie for, before Justice. See DEED, 8.

1. All questions of title and possession may, under the statute, be settled in a suit for the partition of lands.—*Godfrey v. Godfrey et al.*, 6
2. The laws of the State in which lands are situated, must control in acquiring and transferring the title thereto.—*Lucas v. Tucker*, 41
3. The title of a cause is only matter of form, and not of substance.—*Ewing v. Hatfield et al.*, 513

TORT.

Injury to Person. See NEGLIGENCE, 1, 2, 3, 4, 5.

To Wife. See ACTION, 3.

To Child. See ACTION, 4.

TRANSCRIPT.

To Bind Real Estate. See LIEN, 1, 2.

1. Where an amended complaint has been filed, the original complaint should not be included in a transcript of the record, on appeal.—*Downs et al. v. Downs*, 95
2. A transcript of the proceedings of the council in the matter of a street improvement, must contain a copy of the contract, or a *prima facie* liability will not be shown against the property holder.—*The City of Logansport v. Blakemore*, 318
3. A transcript of a judgment containing no *placita*, showing the style and term of the Court in which, and the place where, the judgment was rendered, will not support an action.—*Phelps v. Tilton*, 423
4. The certificate of the judge, required by § 286, 2 R. S., p. 93, to be attached to the transcript of a foreign judgment, to authorize the admission of such transcript in evidence, must show that the person so certifying was judge of the Court in which the judgment was rendered. *Ibid.*
5. Suit upon the transcript of a judgment rendered by a justice of the peace in the

State of Ohio. The judgment appeared to have been rendered by confession, the transcript reciting: "Now comes A., with a power of attorney to confess judgment; whereupon the defendant, by his attorney, waived the issuing and service of process, and confessed judgment," &c. The transcript was certified to be a full, true and complete copy, &c., by a justice of the peace of "*Ashland*, formerly *Richland*, county, *Ohio*;" who further certified that he had the legal custody of the docket in which said judgment was recorded. A certificate was appended by the clerk of *Ashland* county, stating that the justice whose certificate was attached to the transcript was an acting justice of said county, duly commissioned, &c., and that his signature was genuine, and his certificate in due form of law, &c. A certificate was also attached by the clerk of *Richland* county, stating that the justice before whom said judgment was rendered, was, at the time, an acting justice of the peace of *Richland*, now *Ashland*, county, duly qualified, &c. *Held*, that though the record of the justice was informal, and perhaps irregular, it was sufficient as the basis of an action, and sufficiently showed that the justice had acquired jurisdiction of the person of the defendant.—*Dragoo v. Graham*, 427

6. The certificates to the transcript were in due form of law, and the transcript was, under 2 R. S. 1852, § 279, pp. 90, 91, admissible in evidence, without the authentication of a judge. *Ibid.*

TRIAL

Where there has been a trial without an issue, in the Court below, the defect must be brought to the attention of that Court, before it can be noticed in the Supreme Court.—*Knowlton et al. v. Murdock*, 487

TRUSTS.

See CONTRACT, 11.

TRUSTEE.

Quære: Whether, under our code, an action in the nature of an action on the case at law can not be maintained against a trustee for negligence.—*Bennett v. Preston et al.*, 291

U.

USURY.

By Negotiating Bonds at Discount. See PRINCIPAL AND AGENT, 2, 6.

1. A contract made in one State, to be performed in another, is to be governed by the law of the place of performance, so that if a contract is illegal, on account of usury, by the law of the place where it is made, it may still be upheld by virtue of the law of the place of performance.—*Butler et al. v. Myer*, 77
2. If a conveyance be made to a third person, in satisfaction of illegal claims taken up by such third person, at the request of the grantor, such conveyance is upon a valid consideration; and, in this case, there was such a consideration, even if the bonds were void for usury. *Ibid.*
3. If a debtor make a conveyance of his land to his creditor in satisfaction of a usurious debt, the deed, being an absolute conveyance and not a mortgage, can not be avoided for the usury. *Ibid.*
4. Payment of a sum of money exceeding legal interest, for a further extension of time upon a note past due, does not taint the note with usury, but the maker may, probably, have a credit for the amount, as a payment.—*Culph et al. v. Phillips et al.*, 209
5. An answer setting up usury goes only to a part of the cause of action, and should only assume to answer so much, since an answer that assumes to bar the whole cause of action, and in fact only bars a part, is bad on demurrer.—*Webb et al. v. Deitch*, 521
6. An answer, setting up defense of usury in bar of too much of the cause of action is bad.—*McIntire v. Whitney, President of the Indiana Bank*, 528

V.

VENDOR AND PURCHASER.

See MORTGAGE, 6.

1. Where real estate is sold by title bond, the purchaser is not, in the absence of a stipulation to that effect, entitled to the possession of the land before the time for making the conveyance, and though he

may have entered into possession with the consent of the vendor, the latter may resume his possession at any time, on demand.—*Kratemayer v. Brink*, 509

2. Where the vendee of real estate enters into possession under the contract of purchase, with the consent of the vendor, such entry does not constitute him a tenant. *Ibid.*

3. A reply averring a demand of possession after entry, and before suit brought, is sufficiently certain, on demurrer. *Ibid.*

VENDOR'S LIEN.

- A judgment directing the sale of real estate on a vendor's lien, in the first instance, unless the vendee has no personal property out of which the judgment might be made, is erroneous.—*Stevens v. Hurt et al.*, 141

VERDICT.

See REPLEVIN, 4.

Defects Cured by. See PLEADING, 12.

Presumption after. See PRACTICE, 34.

1. Where the jury have, with a general verdict, returned answers to interrogatories propounded to them, and the party against whom the general verdict is rendered has moved for judgment in his favor on the special findings, and excepted to the overruling of his motion, no motion for a new trial is necessary in order to bring the ruling in review in the Supreme Court.—*Horn v. Eberhart*, 118

2. Suit against a father for necessities furnished to, and attendance upon, his minor son during his last sickness, and the expenses of his burial, alleged to have been furnished at the request of the father. The jury found a general verdict for the plaintiff, and in answer to special interrogatories, found specially, 1. That the son left his home voluntarily. 2. That he was twenty years of age. 3. That he was in good health, and capable of supporting himself when he left his father's house. *Held*, that the defendant was not entitled to a judgment on the special findings, as they were not inconsistent with the allegation that the services were rendered at his request. *Ibid.*

VOLUNTARY PAYMENT.

1. An illegal tax, voluntarily paid, can not

be recovered back; and the payment is regarded as voluntary, unless it be made to the officer to procure the release of person or property from his power; and protest at the time of payment, in connection with other circumstances, may be evidence that the payment was made for such a purpose.—*Jenks v. Lima Township*, 326

2. Where an illegal tax has been voluntarily paid by the tax payer, under a mistake of law, it can not be recovered back.—*Martin v. Stanfield*, 336

W.

WAIVER.

Of Tort. See PRACTICE, 14.

Of Matter in Abatement. See PLEADING, 25.

Of Demurrer by Amending. See AMENDMENT, 3, 4.

Of General Denial. See PRACTICE, 49, 50.

By Submitting to Dismissal. See PRACTICE, 49, 51.

Whether a mechanic's lien, like a vendor's, would be waived by taking collateral security, is regarded as doubtful; but certainly the taking of the note of the debtors, in their co-partnership name, indorsed by some of them individually, would not waive the lien, as no additional security would be acquired.—*Millikin et al. v. Armstrong et al.*, 456

WARRANTY.

Evidence of, of Soundness. See PRACTICE, 49, 52.

Where personal property is sold by a person not at the time in the possession of it, there is no implied warranty of title.—*Norton et al. v. Hooten*, 366

WIDOW.

See WILL, 5, 6, 7, 12, 13, 14, 15, 16.

Suit for Partition. See PRACTICE, 55, 56.

Ante-Nuptial Agreement. See PRACTICE, 55, 56.

When the widow of a decedent has obtained an order of the proper court, vesting the estate of her deceased husband in her, the same being appraised at less than \$300,

she is entitled to sue for, and recover, all debts due the decedent, and to the possession of all property belonging to such estate; and it is not material that the assets, in fact, exceed \$300, in value, so long as the order of the Court remains in force.—*Downs et al. v. Downs*, 95

WILL.

1. *A.*'s wife died testate, and by her will bequeathed to *B.*, *C.*, and *D.*, each, the sum of \$200, but left no property out of which the legacies, or any part of them, could be satisfied. After her decease, *A.* entered into an agreement, in writing, with the legatees, by which he agreed to pay to them the several sums bequeathed to them by his wife, in consideration, 1. of one cent; 2. of the love and affection he bore his deceased wife, and the fact that she had done her part in the acquisition of his property; and 3. that she had expressed her desire by her will, that they should have said sums of money. Suit upon the agreement. Answer: want of consideration. *Held*, that the wife's will imposed no obligation on *A.* to pay the legacies out of his property; and as his wife had none of her own, out of which they might be paid, his promise to pay them was not legally binding on him.—*Schnell v. Nell*, 29
2. In order to the transfer of lands by a devise, the will must, in its execution, proof, &c., conform to the law of the place where the land is situated; unless a different mode is recognized by the local law.—*Lucas v. Tucker*, 41
3. An executor derives his power as such, in reference to the transfer of immovable property, from a compliance with the law of the place where he attempts to operate under the will, and not from the will alone. *Ibid.*
4. The curative statutes enacted by our Legislature to heal certain defects in sales made by executors, only embrace the proceedings of such persons as have acted, or attempted to act, under the laws of this State, either by original appointment under the same, or by conforming thereto, if appointed without the State. And, hence, can have no application to a case where executors, appointed and qualified in another State, proceed to sell lands in this

State, under a power contained in the will, without attempting to conform to the laws of this State on the subject of foreign wills. *Ibid.*

5. *A.* died testate in the year 1854. One clause of his will was in these words: "The homestead, on lots Nos. 7, 8, 10, 11 and 12, block No. 18, *Ewing's* addition to the town of *Fort Wayne*, and north half of back lot No. 3, containing about eight acres, part of the east half N. W. qr. Sec. 11, Town. 38, R. 12, E., (balance to *William G. Ewing, Jr.*, as hereafter provided) and the rents and profits of one half of all improved or productive real estate that I own with *Geo. W. Ewing*, or otherwise, or an amount equal to one half of all my interest therein, to be set apart as dower for my beloved wife, *Esther Ewing*, during her life; and first, out of said rents, the taxes and necessary repairs are to be paid: and likewise, to have half my share of any dividends I may be entitled to on bank stock; and likewise so much of the furniture of the homestead as she will need and desire to keep, say one half or two thirds, with a horse and buggy and sleigh, and a wagon and a pair of horses and necessary harness, and two cows,—likewise one cart and harness. The one third or excess of furniture, that she will not need, I desire her to give to our adopted son, *William G. Ewing, Jr.*, if he is alive—if not, then to my nieces, *Mary L.*, *Lavina Ann*, and *Catherine Esther Ewing*. Said *William G. Ewing, Jr.*, to have my best saddle horse, saddle and bridle, and my clothing. My gold watch I give to my nephew, *William G. Ewing*, of Cincinnati." The widow elected to take under the law, then in force, her interest in the real estate of which her husband died seized, instead of the provision made for her by the will, in lieu of such legal interest; and at the same time, so far as she could, elected to take the personal property bequeathed to her by the will. *Held*, that words occurring more than once in a will, must be presumed to be used always in the same sense, unless a contrary intention appears by the context, or unless the words be applied to different subjects: and as the word "*likewise*" is often used in this will in the sense of "*also*," that must be taken to be its meaning, in the clause introducing the bequest of personal property to the widow.—*The State Bank v. Ewing*, 68

6. That considering the word "likewise" to mean "also," and the fact that the technical word "dower," in the phrase "to be set apart as dower," is used after the devise of the interest in the realty, and before the bequest of the personalty, and the further fact that if the bequest of the personalty to the widow is considered as a life estate only, it would prevent a final disposition of the personal property so bequeathed, (no other disposition being made of it,) it would appear to be "plain" within the meaning of the statute, that the phrase "to be set apart as dower," relates only to the realty, and not to the disposition of the personalty. *Ibid.*
7. The widow took an absolute title to the personal property bequeathed to her, notwithstanding her renunciation of the provisions of the will, as to the realty. *Ibid.*
8. *A.*, by her will, directed that her property should be sold by her executors, and the proceeds, after paying certain other legacies, distributed as follows, viz: To her daughters, *B.*, *C.*, and *D.*, the sum of three hundred dollars each; the residue of her estate to be divided equally among her said daughters, share and share alike. *C.* died before the testatrix, leaving one son, her only heir, surviving. At the time of the execution of the will, the testatrix held lands, but disposed of the same before her death. The executor having paid the debts, and a portion of the legacies, brought into Court a balance of \$852 for distribution; and, thereupon, the guardian of the minor son of *C.* filed a petition against *B.*, alleging that in the lifetime of the testatrix, she gave to *B.* and *D.*, in lands and money, their full share of the estate, with an agreement that such advances should be in full discharge of the bequests to them, and asking that *B.* and *D.* be excluded from the distribution. It appeared in evidence, that the testatrix had advanced to *B.* and *D.*, the sum of one hundred dollars each, and also certain lands, valued at four hundred dollars; and there was evidence tending to show, that the lands and money were given and received by them, in full of their legacies, and of their shares in the estate. *Held*, that under § 13, 2 R. S., p. 313, the legacy to *C.* did not lapse by her death, in the lifetime of the testatrix, but vested in her son. — *Clendening et al. v. Clymer, Guardian of Edwards*, 155
9. The money and land received by *B.* and *D.*, must be regarded as an ademption of their respective legacies of three hundred dollars. *Ibid.*
10. Where a parent, or other person *in loco parentis*, bequeaths a legacy to a child, or a grandchild, and afterward, in his lifetime, gives a portion to, or makes a provision for, the same child or grandchild, without expressing it to be in lieu of the legacy, if the portion so received, or the provision made, be equal to, or exceed the amount of the legacy; if it be certain, and not merely contingent; if no other distinct object be pointed out; and if it be *ejusdem generis*; then it will be deemed an ademption of the legacy. *Ibid.*
11. The doctrine of constructive ademption does not apply to a devise of a mere residue; and parol evidence not being admissible to show that advancements were intended to operate as an ademption of a residuary legacy, the residuary interest given by the will to *B.* and *D.* can not be regarded as adempted, by the land and money advanced to them. *Ibid.*
12. *A.* died in 1847, testate, leaving a widow and children. By his will, he directed that all his real and personal estate should remain in the hands of his wife, until his youngest child should become of age, in trust for the support and education of his children; and that when his children should all have arrived at the age of twenty-one years, an equal division should be made among them of what might remain undisposed of. The will expressly reserved to the widow "all the rights given her by law." In 1853, the widow intermarried with one *B.*, and took with her to his house the personal property she had received under the will of her first husband. In 1858, *B.* died, leaving his widow surviving, and still charged with the trusts under the will of *A.*, one of his children not having attained his majority. Suit by the widow against the estate of *B.*, to recover the value of the personal property which belonged to her in trust for *A.*'s children, under the will of her first husband. *Held*, that the widow of *A.* was entitled, as her statutory rights, reserved to her by the will, to take \$150 of the personal property, and such distributive share of the remainder as the statute gave her, (in addition to the use of

one third of the real estate,) which she could dispose of as she pleased.—*Stewart, Guardian of Stewart v. Rinker, Guardian of Rinker*, 264

13. She had a right, under the will, to occupy the remaining two thirds of the real estate, jointly with the children, and to possess and use the personal property in the cultivation of the real, and to expend the income for the education and support of the children; the surplus, if any, being added to the stock, for the use of the children. *Ibid.*
14. She would not be accountable for such of the personal property as should be lost, destroyed or consumed in the using, at least, where reasonable care was exercised by her. *Ibid.*
15. If the portion which the widow was entitled to take in her own right, was not separated from that which she held in trust for her children until the time fixed for the final distribution, she would take in the same proportion, including the increase and income derived from the whole. *Ibid.*
16. *A.* sued the administrator with the will annexed of the estate of *B.*, alleging that she was the granddaughter of *B.*, and entitled under his will to a legacy of \$300; and that the defendant had in his hands large sums of money belonging to said estate, out of which said legacy might be paid, which he refused so to apply, &c. Answer: that *B.*, by his will, provided that his widow should have out of his estate a good, comfortable living; that on final settlement with the Court, he had in his hands the sum of \$718, which he was directed by the Probate Court to put at interest, and out of the interest, or from the principal, if necessary, to pay such sums as might be necessary for the comfortable support of the widow; that he had, in pursuance of said order, paid over large sums to the widow, &c. The will provided: "1. My will and desire is, that my wife have of my estate a good, comfortable living, during her natural life." "13. I mean to be understood in relation to my wife, that she have one third of all my estate, as the law provides, during her life, &c." *Held*, that under the will, the widow was entitled to her support and maintenance, during her life, to one

third of the estate, and no more, and hence the order of the Probate Court was unauthorized by the will.—*Wing, Administrator of Hale v. Miz et al.* 344

17. The administrator should have applied the money in his hands at the time of the demand to the payment of *A.*'s legacy. *Ibid.*

WITNESSES.

1. In a proceeding for partition of lands, instituted by persons claiming to be entitled by descent, against others, some of whom claim to hold as tenants in common with the plaintiffs, by descent from a common grantor, and others of whom claim, by purchase from the ancestor, an adverse and exclusive title to the whole property, the former class of defendants are not competent witnesses for the plaintiffs, to prove that the deed, under which their co-defendants claim an exclusive title, was obtained by fraud, or that the grantor was insane.—*Hunter et al. v. Miller et al.*, 88
2. One defendant can not be examined as a witness for another, where the matter proposed as evidence tends to defeat the action as to all the defendants.—*Anderson et al. v. Weaver*, 223
3. In a suit for partition of lands, one of the defendants filed a cross-complaint, setting up a claim of exclusive ownership in the land by purchase from the common ancestor, and making all the other parties defendants. *Held*, that the other heirs were made by the cross-complaint adverse parties, as to the matters alleged therein, and were not competent witnesses to disprove the allegations of said cross-complaint.—*Cluster v. Gibson et al.*, 477
4. Section 90 of the act to revise the rules and practice in criminal cases, (2 R. S. 1852, p. 372,) which provides that "all persons who are competent to testify in civil actions," shall also be competent witnesses in criminal cases, was intended to adopt the law as it then stood, upon the subject of the competency of witnesses in civil actions; and hence the law of 1861, (Acts 1861, p. 51,) admitting parties to testify in civil actions, does not apply to criminal cases.—*Hoagland v. The State*, 488
5. Where a person summoned as a garnishee

answers that he was indebted to the attachment defendant, but that before the service of the writ of garnishment, he was notified of the assignment of the note constituting such indebtedness, if the plaintiff desires to dispute such assignment for want of consideration or for fraud, it is proper, if not necessary, to bring the person claiming to hold as assignee, before the Court, so that he may be bound by the judgment; and on the trial of an issue thus formed, the attachment defendant would be a competent witness.—*Cadwalader et al. v. Hartley et al.*, 520

6. *Quære*: Whether the question of a fraudulent transfer can, if objected to, be tried in the garnishment proceeding. *Ibid.*

7. Before a witness can be impeached by proof of contradictory statements made out of Court, he must be inquired of as to such statements, after having his memory

refreshed as to time, place and person.—*Owen et al. v. Ryerson*, 620

WRIT.

May Amend by Complaint. See SUMMONS, 1.

1. The Common Pleas act of 1859, (Acts 1859, p. 89,) requires writs in that Court to be made returnable on the first day of the term, but the naming of a wrong day, in the right term, in the writ, is a mere clerical error, which would work no prejudice, the defendant being supposed to know the law; but a writ made returnable to a wrong term, or made to run past a term, would be void.—*Rigsbee v. Bowler*, 167

2. The issuing of a subsequent void writ, while the original valid one is still in the hands of the officer, would not vitiate action under the original.—*Ewing v. Hatfield et al.*, 513

END OF VOL. XVII.

Dr. J. H.

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